IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

RECEIVED
JUL 30 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 79-5146

DAVID RAWLINGS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

J. Vincent Aprile II
COUNSEL FOR PETITIONER

July 27, 1979

I N D E X

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	
1. THE DECISION BELOW HOLDING THAT PETITIONER LACKED STANDING TO RAISE THE CLEAR VIOLATION OF ANOTHER'S FOURTH AMENDMENT RIGHTS, EVEN THOUGH PETITIONER ADMITTED OWNERSHIP OF THE PROPERTY SEIZED AND THE OFFENSE CHARGED IS THE POSSESSION OF THE SEIZED PROPERTY, CONFLICTS WITH PREVIOUS DECISIONS OF THE SUPREME COURT	11
2. THE DECISION BELOW HOLDING THAT PETITIONER LACKED STANDING TO RAISE THE CLEAR VIOLATION OF ANOTHER'S FOURTH AMENDMENT RIGHTS, EVEN THOUGH PETITIONER ADMITTED OWNERSHIP OF THE PROPERTY SEIZED AND THE OFFENSE CHARGED IS THE POSSESSION OF THE SEIZED PROPERTY, CONFLICTS WITH THE DECISIONS OF VARIOUS FEDERAL COURTS	16
3. THE DECISION BELOW WHICH DISREGARDS AS IRRELEVANT ANY EFFECT OF THE WARRANTLESS DETENTION OF PETITIONER AND OTHERS ON THE SUBSEQUENT SEARCHES AND SEIZURES CONFLICTS WITH PREVIOUS DECISIONS OF THE SUPREME COURT	18
Conclusion	20

C I T A T I O N S

Cases:

	Page
Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969)	11
Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)	19, 20
Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973)	12, 14
Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 679 (1969)	19, 20
Dunaway v. New York, ___ U.S. ___, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979)	19, 20
Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)	8, 11, 12, 13
Rakas v. Illinois, ___ U.S. ___, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)	passim
Rawlings v. Commonwealth, Ky., 581 S.W.2d 348 (1979)	passim
Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)	11, 12
Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)	15
Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	9, 18, 19
United States v. Balsamo, 468 F.Supp. 1363 (S.D. Me. 1979)	17
United States v. Mazzelli, 595 F.2d 1157 (9th Cir. 1979)	13, 16, 17
United States v. Reyes, 595 F.2d 275 (5th Cir. 1979)	17
Wong Sun v. United States, 371 U.S. 481, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963)	9, 18

Miscellaneous:

	Page
KRS 218A.010	14
KRS 218A.990	5, 6, 14

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

DAVID RAWLINGS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF KENTUCKY

The petitioner, David Rawlings, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky entered on May 1, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals of Kentucky affirming petitioner's judgment of conviction was filed on February 17, 1978 and is unreported. The order of the Supreme Court of Kentucky granting discretionary review in petitioner's case was entered on November 14, 1978. The opinion of the Supreme Court of Kentucky affirming the opinion of the Kentucky Court of Appeals was filed on May 1, 1979 and is reported as Rawlings v. Kentucky, Ky., 581 S.W.2d 348 (1979). The mandate in petitioner's case was entered by the Supreme Court of Kentucky on May 22, 1979. Copies of the above mentioned opinions, order and mandate are attached hereto.

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on May 1, 1979. The mandate of the Supreme Court of Kentucky was issued in petitioner's case on May 22, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Whether the searches and seizures which produced the contraband drugs and other incriminating evidence were the fruits of the unconstitutional arrests of both petitioner and Vanessa Cox, in violation of the Fourth and Fourteenth Amendments of the Federal Constitution.

2. Whether the Fourth and Fourteenth Amendments were violated by the search of Vanessa Cox's purse and the seizure of its contents when that search was conducted pursuant to a warrant which authorized only a search of the premises of the residence in which she was a visitor.

3. Whether petitioner has standing to raise a clear violation of Vanessa Cox's Fourth Amendment rights as a violation of his own constitutional rights on the basis that he owned the property seized and the offense charged is the unlawful possession of that property.

4. Whether the search of petitioner's person, ostensibly conducted incident to a valid arrest, violated the Fourth and Fourteenth Amendments since probable cause for the arrest was predicated on the fruits of a prior illegal search and seizure of contraband drugs.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Fourth and Fourteenth Amendments to the Federal Constitution.

STATEMENT OF THE CASE

In the middle of the afternoon of October 18, 1976, some six police officers, members of both the Kentucky State Police and a local law enforcement agency, armed with an arrest warrant for Lawrence Marquess, forcibly entered his residence in Bowling Green, Kentucky (Transcript of Evidence, hereinafter designated as T.E., pp. 132-133, 151-152, 181, 196; Transcript of Suppression Hearing of November 29, 1976, hereinafter designated as T.S.H. (I), pp. 2-3). Upon entering the premises, the police found five individuals in the living room of the Marquess residence - the petitioner David Rawlings, Vanessa Cox, Linda Braden, Keith Northern and Dennis Saddler. During the course of the search of the residence for Marquess, the officers noted the odor of burned marihuana and in another room observed marihuana seeds on a mantel (T.E., pp. 133-135, 152-153, 182, 197; T.S.H. (I), pp. 3-5). Marquess, who was under indictment for trafficking in Schedule I controlled substances, was not found during the search of his residence.

The police officers then decided that a search warrant for the house was needed and two of the officers left to procure the warrant (T.E., pp. 136, 153, 182, 197; T.S.H. (I), p. 5). During the forty-five minute wait for the two officers to secure the warrant and return to the residence, the five individuals, including petitioner, were detained in the living room and were informed by the police that they could not leave the room unless they consented to a search of their person (T.E., pp. 25-27, 38-40, 110-111, 153, 182-183, 197-198; Transcript of Suppression Hearing, December 1, 1976, hereinafter designated as T.S.H. (II), pp. 8-10).

Two of the individuals present, Linda Braden and Keith Northern, were permitted to leave after submitting to a search (T.E., pp. 26, 40, 110, 198; T.S.H. (II), p. 10).

After approximately forty-five minutes, the two police officers returned to the residence with a search warrant, authorizing a search of the premises (T.E., pp. 138-139, 154-155, 183; T.S.H. (I), pp. 5, 15). The warrant did not authorize the search of individuals on the premises.

One of the three individuals remaining in the living room, Vanessa Cox, was seated on a couch with her purse placed on the couch between her and petitioner (T.E., pp. 27, 45, 141; T.S.H. (I), p. 6). The officer ordered Vanessa Cox to stand and empty her purse onto the table. When the contents of the purse were emptied out, a large amount of controlled substances was exposed to view (T.E., pp. 27, 45, 149; T.S.H. (I), p. 8). Vanessa Cox informed the police officers that the drugs belonged to petitioner; at that juncture petitioner admitted that he was the owner of the drugs discovered in Ms. Cox's purse (T.E., pp. 28-29, 31, 47, 100-101, 149-150; T.S.H. (I), pp. 9, 12). Petitioner, prior to the initial arrival of the police, had placed the drugs in the purse belonging to Vanessa Cox (T.E., pp. 12-15, 23-24, 35, 100; T.S.H. (II), pp. 3-4, 20).

While the purse belonging to Vanessa Cox was being emptied, petitioner was asked by the police to stand to be searched. At that point petitioner admitted ownership of the drugs found in the purse and was immediately subjected to a search of his person. The search revealed a wad of bills in the amount of $4,500 and a knife in a sheath. Petitioner was then formally placed under arrest (T.E., pp. 46-48, 102, 145-146, 149-150, 156, 160; T.S.H. (I), pp. 9-10, 16-17; T.S.H. (II), pp. 11-13).

On October 27, 1976 petitioner, David Rawlings, was indicted by the Warren Circuit Court Grand Jury in

Bowling Green, Kentucky on four counts of trafficking in controlled substances classified in Schedules I, II and III in violation of Kentucky Revised Statutes (KRS) 218A.990(2) (Transcript of Record, hereinafter designated T.R., pp. 1-4). According to the indictments, the controlled substances were LSD, Benzphetamine, Methaamphetamine, and Methyprylan (T.R., pp. 1-4). On November 1, 1976, petitioner was also indicted in the Warren Circuit Court for the offense of trafficking in a controlled substance classified in Schedule II, Pentobarbitol, in violation of KRS 218A.990(2) (T.R., p. 9).

Petitioner on October 28, 1976 filed a pretrial motion "to suppress all evidence seized in this action because said evidence was derived from an illegal arrest ... without probable cause by the arresting officers" (T.R., p. 14). On November 18, 1976 petitioner filed another motion "to suppress all evidence seized in this action pursuant to a [s]earch [w]arrant ... in that said [s]earch [w]arrant does not specifically name any individual to be searched" (T.R., p. 44).

On November 29 and December 1, 1976, evidentiary hearings were held on the defense motions to suppress. At the latter hearing, petitioner took the witness stand and asserted his ownership of the drugs which the police had discovered in Ms. Cox's purse (T.S.H. (II), pp. 3-7).

The defense motions to suppress were overruled at the conclusion of the December evidentiary hearing (T.S.H. (II), pp. 27, 30).

Following the overruling of the suppression motions, petitioner sought and received the trial court's permission to waive his constitutional right to trial by jury (T.S.H. (II), pp. 30-34; T.R., pp. 48-49). Consequently, petitioner was tried by a judge alone on December 2 and 3, 1976.

At the conclusion of the presentation of evidence, the defense renewed its motion to suppress (T.E., p. 216). The trial judge then withheld the verdict and allowed the prosecution and defense to file simultaneous briefs on the merits of the suppression motion (T.E., p. 234; T.R., p. 56).

On February 11, 1977, the trial court again overruled the defense motions to suppress and also determined that petitioner was without standing to object to the search of Ms. Cox's purse and the seizure of the drugs found in the purse (T.R., pp. 90-94).

That same day petitioner, contrary to his plea, was convicted in the Warren Circuit Court of the offense of trafficking in a controlled substance classified in Schedule I in violation of KRS 218A.990(2) and was sentenced to imprisonment for five years and a fine of three thousand dollars ($3,000.00). Petitioner was also convicted of four counts of possession of controlled substances classified in Schedules II and III in violation of KRS 218A.990(6) and sentenced on each count to confinement in the county jail for one year and a fine of five hundred dollars ($500.00) (T.R., pp. 95-96). The sentences of confinement were to run concurrently for a total of five years of imprisonment (T.R., p. 101).

In a timely motion for a new trial, petitioner again asserted that the searches and seizures in his case were in violation of the United States Constitution (T.R., p. 97). That motion was denied on March 11, 1977 and final judgment was entered that same day (T.R., p. 101). A timely notice of appeal was filed by petitioner (T.R., p. 102).

On February 17, 1978 the Court of Appeals of Kentucky rendered its opinion in petitioner's case and affirmed the judgment of conviction and sentence. David Rawlings v. Commonwealth, Court of Appeals of Kentucky, File

No. CA-1185-MR, decided February 17, 1978. Kentucky's intermediate appellate court noted that on appeal petitioner essentially "contends that he had standing to complain about the search of Ms. Cox's purse; that the search of Ms. Cox's purse was not authorized by the warrant, based on probable cause, or justified by the exigencies of the circumstances involved; that the search warrant for the premises did not authorize the search of all persons on the premises; and that their detention was not based upon probable cause and was, in effect, unreasonable restriction of their freedom." Id.

The Court of Appeals determined that petitioner "did have standing to protest the search of Ms. Cox's purse," but decided the search of the purse was not invalid. Id.

On June 9, 1978 the Kentucky Court of Appeals denied petitioner's petition for rehearing. At that time, a dissenting opinion was filed in the case. The dissenting judge concluded that petitioner and Ms. Cox had been illegally arrested in violation of the Fourth Amendment and that this initial illegality rendered the subsequent searches and seizures also unconstitutional. The dissenter also rejected the majority's holding that the search of Ms. Cox's purse was within the scope of a warrant authorizing only the search of the premises.

Petitioner's timely motion for discretionary review was granted by the Supreme Court of Kentucky on November 14, 1978. On May 1, 1979 the Kentucky Supreme Court rendered its opinion in petitioner's case and affirmed the opinion of the Court of Appeals. Rawlings v. Commonwealth, 581 S.W.2d 348 (1979).

According to the majority opinion, "[t]he central issue in this case is the warrantless search of Vanessa Cox's purse." Id. at 349. In resolving that issue, the Kentucky court was "confronted with the proposition of 'standing' on the part of [petitioner] to raise the Fourth Amendment issue and the ultimate issue - the merits of the Fourth Amendment argument." Id.

The majority opinion of the Kentucky Supreme Court unabashedly announced, "All in all we confess that we find the concept of 'standing' totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally incapable of understanding." Id.

Nevertheless, the majority held "the evidence obtained by the search of Vanessa Cox's purse was properly admitted at trial" and noted that petitioner "probably does not have standing to raise the issue here." Id at 349 (emphasis added).

The majority acknowledged that Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960), "apparently would confer standing on the theory that possession of the drugs both convicts and confers standing since the offense here is possession, admitting ownership is admitting guilt." Id. But the Kentucky Supreme Court reasoned that petitioner "did not find himself in that dilemma" because "he admitted ownership of the drugs when the drugs appeared from the purse and Vanessa Cox stated the drugs belonged to him." Id.

Although admittedly "not sure of the effect of" Rakas v. Illinois, ____ U.S. ____, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), the majority of the Kentucky court felt Rakas "seems to reject the theory of Jones on 'standing.'" Rawlings v. Commonwealth, supra, at 349-350. Consequently, the Kentucky Supreme Court held "the search of Vanessa Cox's purse did not violate [petitioner's] legitimate or reasonable expectation of freedom from governmental intrusion." Id.

Addressing the issue of the search of petitioner's person, the majority "prefer[red] to validate this search on the theory of a search incident to a valid arrest." Id. The Kentucky Supreme Court emphatically stated its intention to "disregard as irrelevant the detention during which the officers were procuring a search warrant." Id.

Justice Lukowsky of the Kentucky Supreme Court filed a dissenting opinion in the instant case and concluded that "[t]he searches and seizures which occurred were the fruits of unlawful arrests and should be suppressed." Id. at 350, citing Wong Sun v. United States, 371 U.S. 481, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Judge Lukowsky reasoned that the conduct of the police officers who "would not allow those present to leave the room or the premises unless they would submit to a search ... constituted an arrest because it significantly deprived those individuals of their freedom of action." Rawlings v. Commonwealth, supra at 350, citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

According to the dissenting justice, this "was not an investigatory stop but an arrest." Rawlings v. Commonwealth, supra at 350. Justice Lukowsky emphasized that this arrest of petitioner and the others was unlawful because "no misdemeanor had been committed in the presence of the police." Id. at 350-351.

As the dissent explains, "[b]ut for the unlawful detention of [petitioner] and the others present in the house, the police would not have discovered any evidence against [petitioner]." Id. at 351. All the discovered evidence "was a result of the unlawful detention and should be suppressed as 'fruit of the poisonous tree.'" Id.

In the second portion of his dissent, Judge Lukowsky explained that, even if petitioner and the others present were not illegally arrested during the forty-five minute detention, "the search of Cox's purse was unlawful because the search was beyond the perimeter of the search warrant and consequently unreasonable under the Fourth Amendment." Id. at 351. The dissent preceived the "real issue" as "whetеher [petitioner] should be permitted to raise the clear violation of Cox's Fourth Amendment rights as a violation of his own on the basis that he owned the property seized and the offense charged is the possession of that property." Id.

The dissent characterized Rakas as "substantially different from the instant case" since it "involved a non-possessory offense and the articles seized were not owned by or in the possession of the defendants." Rawlings v. Commonwealth, supra at 351, citing Rakas v. Illinois, supra, 99 S.Ct. at 423 n. 1. The dissenting judge acknowledged that Rakas had "reformulated the test for standing to contest a search," but added that the decision "left undisturbed the automatic standing rule articulated in Jones v. United States, [citation omitted], for possessory offenses." Rawlings v. Commonwealth, supra at 351-352.

Because petitioner "is charged with a possessory offense," the dissenting judge chastised that "the Commonwealth should not be heard to say that his possession of these drugs is sufficient to support his conviction but insufficient to support a reasonable expectation of privacy when they are concealed in the purse of a companion." Id. at 352. According to the dissent, petitioner "was entitled to expect that governmental officals would intrude into the purse only with consent or by complying with the Fourth Amendment." Id. Because "the search of Cox's purse was an unreasonable search and seizure," the dissenting judge reasoned "its results should be suppressed." Id.

Lastly, addressing the search of petitioner's person, the dissent found that search "unlawful because it was not incident to a valid arrest." The "'second' arrest upon which the search was based was itself unlawful" since "it was based upon the fruits of the illegal search for and seizure of the drugs in Cox's purse." Id.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW HOLDING THAT PETITIONER LACKED STANDING TO RAISE THE CLEAR VIOLATION OF ANOTHER'S FOURTH AMENDMENT RIGHTS, EVEN THOUGH PETITIONER ADMITTED OWNERSHIP OF THE PROPERTY SEIZED AND THE OFFENSE CHARGED IS THE POSSESSION OF THE SEIZED PROPERTY, CONFLICTS WITH PREVIOUS DECISIONS OF THE SUPREME COURT.

As a general rule, Fourth Amendment rights may not be vicariously asserted. Alderman v. United States, 394 U.S. 165, 89 S.Ct. 961, 965, 22 L.Ed.2d 176 (1969). To contest a search or seizure on Fourth Amendment grounds, a defendant must have either "actual standing" or "automatic standing."

Prior to 1960, under "the conventional standing requirement," courts had "generally required that the movant [seeking to suppress evidence obtained as a result of an unconstitutional search and seizure] claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." Jones v. United States, 362 U.S. 257, 80 S.Ct. 725, 731, 4 L.Ed.2d 697 (1960).

By claiming ownership or possession of the seized property or by claiming a substantial possessory interest in the premises searched, a defendant could establish actual standing to contest the search and seizure. Throughout the evolution of the concept of standing to raise Fourth Amendment violations, this Court has acknowledged the constitutional principle that an actual ownership or possessory interest in that which was seized confers standing to challenge the search and seizure.

For example, in Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968), a prosecution for a non-possessory offense, a suitcase containing evidence incriminating the defendant was found in the basement of a house belonging to another. On motion to suppress the defendant testified that the suitcase was his. This Court recognized that, "[u]nder the standing rules set out in Jones, there will be occasions, even in prosecutions for nonpossessory offenses, when a defendant's testimony will be needed to establish standing." Simmons v. United States, supra, 88 S.Ct. at 974. "The only, or at least the most natural, way in which [the defendant in Simmons] could found standing to object to the admission of the suitcase was to testify that he was its owner." Id., 88 S.Ct. at 974-975. "Thus, his testimony is to be regarded as an integral part of his Fourth Amendment exclusion claim." Id.

As recently as 1973, this Court reiterated that "[u]nder the Simmons doctrine the defendant is permitted to establish the requisite standing by claiming 'possession' of incriminating evidence." Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 1569, 36 L.Ed.2d 208 (1973). To illustrate this point, this Court suggested that the defendants in Brown "could have asserted, at the pretrial suppression hearing, a possessory interest" in the evidence seized to establish standing.

A defendant is entitled to automatic standing under the doctrine originally formulated in Jones v. United States, supra, if he is charged with a crime that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure.

When "possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence." Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 974, 19 L.Ed.2d 1247 (1968).

Automatic standing "eliminates any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged." Jones v. United States, supra, 80 S.Ct. at 732. "The possession on the basis of which [a defendant] is to be ... convicted suffices to give him standing." Id. "In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure' upon a motion to suppress evidence prior to trial." Id., 80 S.Ct. at 733.

Recently in Rakas v. Illinois, ____ U.S. ____, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978), this Court reconsidered the portion of the Jones decision which dealt with standing based on an interest in the premises searched and the principles that should control such cases. However, the substance of the opinion reaffirmed the principle recognized in Jones that a possessory or ownership interest in the eivdence seized confers actual standing. United States v. Mazzelli, 595 F.2d 1157, 1160 (9th Cir. 1979).

For example, in Rakas this Court initially emphasized the failure of the defendants to assert a claim of ownership over the items seized. Rakas v. Illinois, supra, 99 S.Ct. at 423-424 n. 1. This comment implicitly recognizes that a possessory interest in the seized evidence confers standing to challenge the seizure. Later in the decision, after asserting that a "casual visitor" to the premises should not be able to contest the impropriety of the search, this Court added that "[t]his is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search." Rakas v. Illinois, supra at 430 n. 11.

Finally, in holding that the petitioners' claim in Rakas must fail, this Court stressed that "[t]hey asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized." Rakas v. Illinois, supra, 99 S.Ct. at 433 (emphasis added).

The Rakas opinion repeatedly endorses the proposition that actual standing is established by a possessory or ownership interest in the property seized.

Although this Court in Rakas acknowledged that it has "not yet had occasion to decide whether the automatic standing rule of Jones survives [the] decision in Simmons," it remains undeniable that the concept of automatic standing in possession offenses is still a viable principle of constitutional law which is binding precedent on the state and federal courts. Rakas v. Illinois, supra, 99 S.Ct. at 426 n. 4, citing Brown v. United States, supra, 93 S.Ct. at 1568-1569. Until this Court expressly rules otherwise, the automatic standing doctrine of Jones continues to provide standing for defendants facing trial on possession charges.

Petitioner in the case at bar met his burden of establishing actual standing due to his admission of ownership of the drugs seized from Ms. Cox's purse both at the time of the search and later at the suppression hearing.

Additionally, since the possession of the seized drugs is itself an essential element of the charged offenses,[1] petitioner was entitled to automatic standing under the still viable rationale of Jones.

Despite petitioner's clear constitutional entitlement to challenge the search of Ms. Cox's purse on the basis

---

[1] KRS 218A.990(2) provides that "[a]ny person who knowingly and unlawfully traffics in a controlled substance classified in Schedules I or II other than a narcotic drug, except marijuana, or in any controlled substance classified in Schedule III," commits a criminal offense. "Traffic" as used in KRS 218.A.990(2) "means to manufacture, sell, transfer or possess with intent to sell a controlled substance." KRS 218A.010(19).

Similarly, KRS 218A.990(6) provides that "any person who knowingly and unlawfully possesses any controlled substance classified in Schedules I, II, or III which is not a

of either actual or automatic standing, the Supreme Court of Kentucky stated that petitioner "probably does not have standing to raise the issue" of the warrantless search of the purse and held the evidence obtained by the search "was properly admitted at trial." Rawlings v. Commonwealth, supra at 349. This decision to deny petitioner standing was made in the context of the Kentucky Supreme Court's "confession" that "the concept of 'standing' [is] totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally incapable of understanding." Id. at 349. The Kentucky Supreme Court added that they were "not sure of the effect of Rakas," but felt that the decision "seems to reject the theory of Jones on "standing." Rawlings v. Commonwealth, supra at 349-350.

The published decision of the Kentucky Supreme Court in petitioner's case constitutes an interpretation of federal constitutional law which is binding on the inferior appellate and trial courts of Kentucky. This opinion, at least in the state courts of Kentucky, nullifies the doctrine of actual standing based on an interest in the property seized and abrogates the principle of automatic standing in possession offenses. Unless this Court acts to rectify this conflict between the decision at bar and the binding precedents of this Court, criminal defendants in Kentucky facing possession offenses or asserting a possessory interest in the evidence seized from another person will be deprived of the opportunity to challenge the constitutionality of that search and seizure.

This conflict between Kentucky's interpretation of the constitutional principles of standing and this Court's prior decisions assumes even greater significance in view of the limitations on federal collateral review of Fourth Amendment issues imposed by Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

The conflicts detailed above justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW HOLDING THAT PETITIONER LACKED STANDING TO RAISE THE CLEAR VIOLATION OF ANOTHER'S FOURTH AMENDMENT RIGHTS, EVEN THOUGH PETITIONER ADMITTED OWNERSHIP OF THE PROPERTY SEIZED AND THE OFFENSE CHARGED IS THE POSSESSION OF THE SEIZED PROPERTY, CONFLICTS WITH THE DECISIONS OF VARIOUS FEDERAL COURTS.

As previously explained, the Supreme Court of Kentucky ruled in the case sub judice that petitioner "probably does not have standing to raise the issue" of the warrantless search of Vanessa Cox's purse. Rawlings v. Commonwealth, supra at 349. The Kentucky court, although admittedly "not sure of the effect of Rakas" on the doctrine of standing, utilized that decision to deny petitioner actual standing and automatic standing to contest the search of the purse and the seizure of the drugs. Id. at 349-350.

Recently, the Court of Appeals for the Ninth Circuit addressed the issue of whether this Court's recent decision in Rakas altered in any way the doctrine of actual standing arising from an ownership or possessory interest in the evidence seized. United States v. Mazzelli, 595 F.2d 1157 (9th Cir. 1979).

In Mazzelli defendant Conway moved to suppress the cocaine discovered during a search of the suitcase carried by defendant Mazzelli. Mazzelli was indicted for possession and conspiracy, while Conway was indicted solely on the offense of conspiracy. Id. at 1157-1158. The issue on appeal was whether Conway had standing to move to suppress the cocaine as the fruit of an unlawful search. Conway asserted standing on two grounds: (1) ownership of the suitcase which was searched; and (2) a claim of a

possessory interest in the cocaine which was seized. Id. at 1158.

The Mazzelli court held Conway had established actual standing, as distinguished from automatic standing, on the basis of his possessory interest in the cocaine. Id. at 1159-1160. The Ninth Circuit Court of Appeals analyzed the Rakas decision and concluded "in substance [Rakas] reaffirmed the proposition recognized in Jones that a possessory interest in that which was seized confers standing." United States v. Mazzelli, supra at 1159-1160.

The Mazzelli analysis of the impact of Rakas on the doctrine of actual standing generated by a possessory interest in the thing seized conflicts with the decision of the Kentucky Supreme Court in petitioner's case.

At least one federal court of appeals and one federal district court have observed that "[t]he Supreme Court has questioned, but has not decided, whether the concept of automatic standing as expounded in Jones . . . remains viable in light of Simmons v. United States." United States v. Balsamo, 468 F.Supp. 1363, 1378 n. 19 (S.D. Me. 1979), citing Rakas v. Illinois, supra, 99 S.Ct. at 426 n. 4; United States v. Reyes, 595 F.2d 275, 279 n. 2 (5th Cir. 1979). However, both federal courts indicated they "will assume that the automatic standing rule of Jones has not been implicitly overruled by Simmons until the Supreme Court rules on that issue." United States v. Balsamo, supra at 1378 n. 19; United States v. Reyes, supra at 279.

The decisions of these two federal courts to continue to treat the doctrine of automatic standing in possession offenses as a viable constitutional principle conflicts dramatically with the Kentucky Supreme Court's decision in petitioner's case to consider that the Rakas decision has rejected the automatic standing concept enunciated in Jones.

The conflicts detailed above justify the grant of certiorari to review the judgment below.

3. THE DECISION BELOW WHICH DISREGARDS AS IRRELEVANT ANY EFFECT OF THE WARRANTLESS DETENTION OF PETITIONER AND OTHERS ON THE SUBSEQUENT SEARCHES AND SEIZURES CONFLICTS WITH PREVIOUS DECISIONS OF THE SUPREME COURT.

In his dissenting opinion in petitioner's case, Justice Lukowsky of the Kentucky Supreme Court reasoned that "[t]he searches and seizures which occurred were the fruits of unlawful arrests and should be suppressed." Rawlings v. Commonwealth, supra at 350, citing Wong Sun v. United States, 371 U.S. 481, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

Justice Lukowsky contended that the conduct of the police officers who "would not allow those present to leave the room or the premises unless they would submit to a search ... constituted an arrest because it significantly deprived those individuals of their freedom of action." Rawlings v. Commonwealth, supra at 350, citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

According to the dissenting justice, this "was not an investigatory stop but an arrest." Rawlings v. Commonwealth, supra at 350. Justice Lukowsky emphasized that this arrest of petitioner and the others was unlawful because "no misdemeanor had been committed in the presence of the police." Id. at 350-351.

As the dissent explains, "[b]ut for the unlawful detention of [petitioner] and the others present in the house, the police would not have discovered any evidence against [petitioner]." Id. at 351. All the discovered evidence "was a result of the unlawful detention and should be suppressed as 'fruit of the poisionous tree.'" Id.

The majority opinion in the case sub judice completely neglects this entire constitutional issue and "disregard[s] as irrelevant the detention during which the officers were procuring a search warrant." Id. at 350.

Recently in Dunaway v. New York, ____ U.S. ____, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), this Court concluded that the police "violated the Fourth and Fourteenth Amendments when, without probable cause to arrest, they took petitioner into custody, transported him to the police station and detained him there for interrogation." Id., 99 S.Ct. at 2253, 2258.

This Court in Dunaway reiterated that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Id., 99 S.Ct. at 2253 n. 6, citing Terry v. Ohio, supra, 88 S.Ct. at 1877.

Citing to Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 679 (1969), and Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975), this Court in Dunaway concluded that "detention for custodial interrogation - regardless of its label - intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." Dunaway v. United States, supra, 99 S.Ct. at 2258.

Under the facts of the instant case, petitioner, Vanessa Cox, and the three other individuals were detained for approximately forty-five minutes. The detention was not accomplished as a formal arrest and it was not for the purpose of custodial interrogation. Nevertheless, under the Dunaway analysis, this detention of petitioner and the others was an "investigatory seizure" which intruded so severely on the interests protected by the Fourth Amendment that it could be justified only on the basis of probable cause to arrest.

The refusal of the Kentucky Supreme Court to determine the constitutionality of the investigatory seizure of petitioner and the others at the Marquess residence and its effect on the subsequent searches of these people is in conflict with this Court's decisions in Dunaway, Brown, and Davis, all supra.

The conflicts detailed above justify the grant of certiorari to review the judgment below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Kentucky.

Respectfully submitted,

J. Vincent Aprile II

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No.

DAVID RAWLINGS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

CERTIFICATE OF SERVICE

I, J. Vincent Aprile II, counsel for petitioner, hereby certify that the attached Petition for Writ of Certiorari, Motion For Leave To Proceed In Forma Pauperis, Affidavit of Indigency, and Notice of Appearance were served on respondent by depositing copies of the aforementioned documents in the United States mail, first-class postage prepaid, on July 27, 1979 addressed to respondent's counsel, Robert F. Stephens, Attorney General, Commonwealth of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

J. Vincent Aprile II

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES

COUNSEL FOR PETITIONER

Supreme Court, U.S.
FILED
JAN 24 1980
MICHAEL RODAK, JR., CLERK

APPENDIX

In The Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5146

DAVID RAWLINGS, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

PETITION FOR CERTIORARI FILED JULY 30, 1979
CERTIORARI GRANTED DECEMBER 10, 1979

INDEX

	Page
Chronological list of relevant docket entries	1
Transcript of record in Warren Circuit Court:	
Indictment No. 17107	4
Indictment No. 17108	5
Indictment No. 17109	6
Indictment No. 17110	7
Indictment No. 17137	8
Motion to suppress evidence derived from an illegal arrest	9
Motion to suppress evidence due to defective search warrant and illegal arrest	10
Motion to suppress illegally seized evidence	11
Motion to waive trial by jury	12
Order sustaining motion to waive trial by jury	13
Trial order	15
Order scheduling announcement of verdict	17
Order and trial verdict	18
Motion for new trial	24
Judgment	25
Notice of appeal	27
Transcript of suppression hearing held on November 29, 1976 in Warren Circuit Court:	28
Testimony of Mr. Eddie Railey:	
Direct examination by Mr. Caudill	30
Cross-examination by Mr. Thompson	36
Re-direct examination by Mr. Caudill	37
Transcript of suppression hearing held on December 1, 1976 in Warren Circuit Court:	40
Testimony of Mr. David Rawlings:	
Direct examination by Mr. Parry	41
Cross-examination by Mr. Caudill	49
Opinion of Kentucky Court of Appeals, filed February 17, 1978	61
Order of Kentucky Court of Appeals denying petition for rehearing, filed June 9, 1978	68
Dissenting Opinion of Judge Lester, Kentucky Court of Appeals, filed June 9, 1978	69
Order of Kentucky Supreme Court granting discretionary review, filed November 14, 1978	75
Opinion of Kentucky Supreme Court, filed May 1, 1979	76
Mandate of Kentucky Supreme Court, issued May 22, 1979	84
Order of the Supreme Court of the United States granting leave to proceed in forma pauperis and granting petition for writ of certiorari, December 10, 1979	85

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 27, 1976–Defendant David Rawlings was indicted in the Warren Circuit Court in Bowling Green, Kentucky on four counts of trafficking in controlled substances classified in Schedules I, II and III (LSD, Benzphetamine, Methamphetamine, and Methyprylon), on or about October 18, 1976.

November 1, 1976–Defendant David Rawlings was indicted in the Warren Circuit Court for the offense of trafficking in a controlled substance classified in Schedule II, Pentobarbital, on or about October 18, 1976.

November 3, 1976–Defendant David Rawlings filed a pretrial motion to suppress all evidence seized in the case because that evidence was derived from an illegal arrest of the defendant.

November 15, 1976–Defendant David Rawlings filed a motion to suppress all evidence confiscated in the case due to the defective search warrant and the illegal arrest of the defendant.

November 18, 1976–Defendant David Rawlings filed a motion to suppress all evidence seized in the case pursuant to a search warrant because the warrant did not specifically name any individual to be searched.

December 2 and 3, 1976–Defendant David Rawlings was tried by judge alone.

February 11, 1977–Contrary to his plea, defendant David Rawlings was convicted in the Warren Circuit Court of one count of trafficking in a controlled substance classified in Schedule I and four counts of possession of controlled substances classified in Schedules II and III; defendant Rawlings was sentenced to five years of imprisonment and a total fine of five thousand dollars ($5,000.00).

February 14, 1977–Defendant David Rawlings filed a motion for a new trial asserting that the searches and seizures in his case were in violation of the United States Constitution.

March 14, 1977–Motion for new trial overruled; final judgment was entered against defendant. Notice of appeal filed in the Warren Circuit Court by defendant.

February 17, 1978–Court of Appeals of Kentucky rendered its opinion in defendant's case and affirmed the conviction.

June 9, 1978–Court of appeals of Kentucky denied the defendant's petition for rehearing.

November 14, 1978–Supreme Court of Kentucky granted defendant's motion for discretionary review of the decision of the Kentucky Court of Appeals.

May 1, 1979–Supreme Court of Kentucky rendered its opinion in defendant's case and affirmed the decision of the Kentucky Court of Appeals.

May 22, 1979–Supreme Court of Kentucky issued mandate in defendant's case.

WARREN CIRCUIT COURT

INDICTMENT NOS. 17107, 17108, 17109, 17110 and 17137

COMMONWEALTH OF KENTUCKY, PLAINTIFF

v.

DAVID RAWLINGS, DEFENDANT

Transcript of Record on Appeal

Warren Circuit Court

October **Term, 197**6

THE COMMONWEALTH OF KENTUCKY
AGAINST
David Rawlings

Indictment

The Grand Jury of the County of Warren in the name and by the authority of the Commonwealth of Kentucky, accuse

David Rawlings

of the crime of Trafficing in a Schedule I Controlled Substance **committed as follows, to-wit: The said** David Rawlings **heretofore, to wit: On or about the** 18 **day of** October **A.D., 19** 76**, and before the finding of this indictment in the County aforesaid, did unlawfully,** / have in his possession for the purpose of sale, a schedule I Controlled Substance, a quantity of LSD, Contrary to KRS No. 218A.990 (2)

[Ind. No. 17107]

Done as aforesaid within the year last past and against the peace and dignity of the Commonwealth of Kentucky.

Morris Lowe

Commonwealth's Attorney, Eighth Judicial District, Kentucky

Warren Circuit Court

OCTOBER **Term, 197**6

THE COMMONWEALTH OF KENTUCKY
AGAINST
David Rawlings

Indictment

The Grand Jury of the County of Warren in the name and by the authority of the Commonwealth of Kentucky, accuse

David Rawlings

of the crime of Trafficing in a Schedule III Controlled Substance **committed as follows, to-wit: The said** David Rawlings **heretofore, to wit: On or about the** 18 **day of** October **A.D., 19** 76**, and before the finding of this indictment in the County aforesaid, did unlawfully,** and knowingly have in his possession, for purpose of sale, a schedule III controlled substance, a quantity of Benzphetamine, Contrary to KRS Number 218A.990 (2)

[Ind. No. 17108]

Done as aforesaid within the year last past and against the peace and dignity of the Commonwealth of Kentucky.

Morris Lowe

Commonwealth's Attorney, Eighth Judicial District, Kentucky

Warren Circuit Court

OCTOBER **Term, 1976**

THE COMMONWEALTH OF KENTUCKY
AGAINST
DAVID RAWLINGS — **Indictment**

The Grand Jury of the County of Warren in the name and by the authority of the Commonwealth of Kentucky, accuse DAVID RAWLINGS

of the crime of TRAFFICING IN A SCHEDULE II CONTROLLED SUBSTANCE **committed as follows, to-wit: The said** DAVID RAWLINGS **heretofore, to wit: On or about the** 18 **day of** OCTOBER **A.D., 19** 76 **, and before the finding of this indictment in the County aforesaid, did unlawfully,** and knowingly have in his possession, for purpose of sale, a schedule II controlled substance, a quantity of Methaamphetamine, Contrary to KRS Number 218A.990 (2)

[Ind. No. 17109]

Done as aforesaid within the year last past and against the peace and dignity of the Commonwealth of Kentucky.

Morris Lowe

Commonwealth's Attorney, Eighth Judicial District, Kentucky

Warren Circuit Court

OCTOBER **Term, 1976**

THE COMMONWEALTH OF KENTUCKY
AGAINST
DAVID RAWLINGS — **Indictment**

The Grand Jury of the County of Warren in the name and by the authority of the Commonwealth of Kentucky, accuse

DAVID RAWLINGS

of the crime of TRAFFICING IN A SCHEDULE III CONTROLLED SUBSTANCE **committed as follows, to-wit: The said** DAVID RAWLINGS **heretofore, to wit: On or about the** 18 **day of** OCTOBER **A.D., 19** 76 **, and before the finding of this indictment in the County aforesaid, did unlawfully,** and knowingly have in his possession, for purpose of sale, a schedule III controlled substance, a quantity of Methyprylan, Contrary to KRS Number 218A.990 (2)

[Ind. No. 17110]

Done as aforesaid within the year last past and against the peace and dignity of the Commonwealth of Kentucky.

Morris Lowe

Commonwealth's Attorney, Eighth Judicial District, Kentucky

Warren Circuit Court

NOVEMBER **Term, 19**76

THE COMMONWEALTH OF KENTUCKY
AGAINST
DAVID RAWLINGS

Indictment

The Grand Jury of the County of Warren in the name and by the authority of the Commonwealth of Kentucky, accuse

DAVID RAWLINGS

of the crime of TRAFFICING IN A SCHEDULE II CONTROLLED SUBSTANCE

committed as follows, to-wit: The said DAVID RAWLINGS **heretofore, to wit: On or about the** 18 **day of** OCTOBER **A.D., 19**76 **, and before the finding of this indictment in the County aforesaid, did unlawfully,** and knowingly have in his possession, for purpose of sale, a schedule II controlled substance, a quantity of Pentobarbital, Contrary to KRS Number 218A.990 (2)

[Ind. No. 17137]

Done as aforesaid within the year last past and against the peace and dignity of the Commonwealth of Kentucky.

Morris Lowe

Commonwealth's Attorney, Eighth Judicial District, Kentucky

WARREN CIRCUIT COURT
DIVISION II

Indictment Nos. 17107-a
17107-b through 17110

COMMONWEALTH OF KENTUCKY
Plaintiff

vs.

DAVID RAWLINGS
Defendant

MOTION TO SUPPRESS

Comes the Defendant, David Rawlings, and moves the Court to suppress all evidence seized in this action because said evidence was derived from an illegal arrest of the Defendant without probable cause by the arresting officers.

WHEREFORE, the Defendant prays the Court to grant said Motion.

Kelly Thompson, Jr.
Attorney for Defendant

CERTIFICATE:

This is to certify that a true copy of the foregoing was this day served upon the Honorable Morris Lowe, Commonwealth Attorney.

Kelly Thompson, Jr.

NOTICE:

Foregoing Motion will be brought on for hearing by the Court on November 10, 1976, at the Pretrial Conference of this styled action.

Kelly Thompson, Jr.

WARREN CIRCUIT COURT
DIVISION II

Indictment Nos. 17107 17107-A,
17108, 17109, and 17110

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

MOTION TO SUPPRESS

Comes the Defendant, David Rawlings, by Counsel and moves the Court to suppress the evidence confiscated in the above action in that the Warrant for said search was defective as to the Defendant, David Rawlings; and also, in that the search of the Defendant was conducted after an illegal arrest of the Defendant.

WHEREFORE, the Defendant prays the Court to grant the above Motion.

Kelly Thompson, Jr.
Attorney for Defendant

CERTIFICATE:

This is to certify a true copy of the foregoing was this day day served upon the Hon. Morris Lowe. This_____day of November, 1976.

Kelly Thompson, Jr.
Attorney for Defendant

NOTICE:

The foregoing Motion will be brought on for hearing before the Trial of this action on November 23, 1976, at the hour of 9:00 A.M.

Kelly Thompson, Jr.

WARREN CIRCUIT COURT
Division II

Indictment Nos. 17107, 17108,
17109, 17110, and 17137

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

MOTION TO SUPPRESS ILLEGALLY SEIZED EVIDENCE

Comes the Defendant, David Rawlings, by counsel, and moves the Court to suppress all evidence seized in this action pursuant to a Search Warrant issued by County Judge, Basil Griffin, in that said Search Warrant does not specifically name any individual to be searched.

In support of this Motion, Defendant sites the United States of America V. Festa, 192 F. SUPP 160 (1960); United Strates V. DiRE, 332 U.S. 581; Marron V. United States, 275, U.S. 192; United States V. Haywood, 284 F. SUPP 245 (1968).

WHEREFORE, the Defendant prays the Court to grant the above Motion.

Kelly Thompson, Jr.

CERTIFICATE:

This is to certify that a true copy of the foregoing was this day served upon the Honorable Morris Lowe, Commonwealth Attorney.

Kelly Thompson, Jr.

NOTICE:

The foregoing Motion will be brought on for hearing before the Court at 3:45 P.M. on November 22, 1976.

Kelly Thompson, Jr.

WARREN CIRCUIT COURT
DIVISION II

Indictment Nos. 17107-A
17107-B, through 17110

COMMONWEALTH OF KENTUCKY
Plaintiff

vs.

DAVID RAWLINGS
Defendant

MOTION TO WAIVE TRIAL BY JURY

Comes the Defendant, David Rawlings, and moves the Court to allow the Defendant to waive his right to a trial by Jury so as to conduct a trial of this case solely before the Honorable Judge J. David Francis.

Wherefore, the Defendant prays the Court to grant the above Motion.

Kelly Thompson, Jr.
Attorney for Defendant

CERTIFICATE:

This is to certify that a true copy of the foregoing was this day served upon the Honorable Morris Lowe, Commonwealth Attorney.

Kelly Thompson, Jr.

NOTICE:

The foregoing Motion will be brought on for hearing on Monday, November 29, 1976, at the hour of 2:00 p.m.

Kelly Thompson, Jr.

WARREN CIRCUIT COURT
Division No. II

Indictment Nos. 17107, 17108
17109, 17110, 17137

COMMONWEALTH OF KENTUCKY
Plaintiff

vs.

DAVID RAWLINGS
Defendant

ORDER SUSTAINING DEFENDANT, DAVID RAWLINGS' MOTION THAT HE BE ALLOWED TO WAIVE A JURY TRIAL AND BE TRIED BY THE COURT

Prior to the beginning of the above styled case, the Court took notice of the fact that the Defendant had filed a written Motion Waiving Jury Trial and allowing him to be tried solely by the Court. The Court, with the Defendant Rawlings present, with his attorneys, first OVERRULED the Motion as the Court felt that the Defendant may not fully understand the matter sufficiently to intelligently make such a waiver, and thereupon a Suppression Hearing was held, at which time the Defendant and his counsel, the Honorable Ron Parry and the Honorable Kelly Thompson, were present and the Defendant's father was also present, and at the conclusion of this Hearing, the Defendant, with his counsel, left. Shortly thereafter the Defendant reentered this Court's chambers and announced that he wanted to talk with the Judge. The Court looked up from his desk and informed the Defendant that he could not talk without his attorney being present, but then noted that his attorneys, Parry and Thompson, were right behind him, and that the Defendant then, in his own words, said "Judge, I want to be tried without a Jury".

The Court then took into consideration the case of Short v. Commonwealth, 519 SW2d, 828, and again questioned the Defendant carefully and determined that the Defendant was twenty-one (21) years of age, was a high school graduate, and had formerly been enrolled, but not

graduated from, Western Kentucky University, that he was intelligent and articulate, and had the advice of two employed attorneys who appeared knowledgeable and capable in advising this Defendant, and the Defendant's father was also present, and that it further appeared to the Court that this was the Defendant's decision and that it had a sound basis in law and fact.

NOW THEREFORE IT IS ORDERED, DIRECTED, AND ADJUDGED, that the Defendant be, and he is hereby, allowed to be tried before the Court without a Jury.

This the 1st day of December, 1976.

JUDGE, WARREN CIRCUIT
COURT DIVISION II

WARREN CIRCUIT COURT
Division II

Indictment Nos. 17107,
17108, 17109, 17110, 17137

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

TRIAL ORDER

The defendant being present and represented by attorney's Ron Perry, and Kelly Thompson. The Commonwealth being represented by Mike Caudill, Asst. Commonwealth Attorney. A motion having been made that this defendant be tried by the Court without a jury, and after extension examination of the defendant by the Judge, in the presence of the defendant's father, it was ordered that the Court would try this case without the jury, as the defendant having stated that this was his desire. The defendant waived the reading the the indictments, but the Judge inquired of him as to his plea in each case, to which he entered Not Guilty to each indictment. The Commonwealth Attorney announced that he would let the indictments stand as his opening statement, and the defense reserved opening statements. The Commonwealth proceeded to call their witnesses.

The lunch hour approaching, Court recessed at 11:40 A.M. and all parties were requested to return at 2:00 P.M. Again Commonwealth witnesses were heard continuously except for a short recess at 3:20 P.M. until 6:00 P.M. at which time Court adjourned until 9:30 the following morning December 3, 1976.

On Friday morning, December 3, 1976, Court resumed, with the further testimony of Commonwealth witnesses. The Commonwealth closed their case in chief at 10:50 A.M. At this time the defense witness were then called. They announced their case closed at 11:12 A.M. Rebuttal testimony was started by the Commonwealth. During the tes-

timony of Eddie Raily, a question arose that the defense had not been able to have the substances in question analyzed. At this time Morris Lowe, Commonwealth Attorney, had a motion that the case be continued so that the defense could have the substances examined by a chemist of their choosing, who was duly certified and qualified by the Federal Drug Administration. The Judge took this under advisement and adjourned until 1:00.

At 1:00 P.M. Court again resumed, the Judge announced that he had considered the motion and would Sustain same. Mr. Lowe then made a motion that the money held as evidence in this case be returned to the defendant, said motion Sustained. Arguments for both the Commonwealth and defense were heard by the Judge, and he recessed until 4:00 P.M.

When Court resumed at 4:00 P.M. further arguments, were heard and citiations were presented to the Court. The Court then ruled, that each attorney would be allowed to file a brief, these briefs' were to be filed simultaneous by Monday January 10, 1978. It is Ordered that this case be passed until January 10, 1976.

This———day of ———, 1976.

JUDGE, WARREN CIRCUIT COURT
DIV. II. JDF

WARREN CIRCUIT COURT
Division II

Indictment Nos. 17107, 17108,
17109, 17110, and 17137

COMMONWEALTH OF KENTUCKY

Plantiff

vs.

DAVID RAWLINGS

Defendant

ORDER

The Court having heard the testimony and proof in the above-styled action, and having considered same;

IT IS HEREBY ORDERED that the Defendant, Defendant's Counsel, and the Commonwealth Attorney be present in the Warren Circuit Courtroom at 11:00 a.m. Friday February 11th, 1977, at which time a decision will be handed down in this case.

This 9th day of February, 1977.

J. David Francis, Judge
Division Two
Warren Circuit Court

WARREN CIRCUIT COURT
Division II

Indictment Nos. 17107, 17108,
17109, 17110, 17137

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

ORDER

In the above styled Indictments the Defendant, David Rawlings, in each Indictment is charged with the offense of knowingly having in his possession for purpose of sale the following listed substances:

Ind. No. 17107	Lysergic Acid Diethylamide	Schedule I
Ind. No. 17108	Benzphetamine	Schedule III
Ind. No. 17109	Methamphetamine	Schedule II
Ind. No. 17110	Methyprylon	Schedule III
Ind. No. 17137	Penobarbital	Schedule II
Ind. No. 17107-A	Phentabarbital	Schedule II
Ind. No. 17107-B	Amphetamines	Schedule II

The following of the above have at some stage of the proceedings been dismissed.

Ind. No. 17107-A	Phentabarbital	Schedule II
Ind. No. 17107-B	Amphetamines	Schedule II

The Defendant had filed a written Motion for this case to be heard before the Court without the intervention of a Jury and this motion was OVERRULED. On Monday, November 29, 1976, a Suppression Hearing was held and the Court Ordered that the items which were the subject of the search and seizure were admissible into evidence and that the case would go to trial as scheduled on the following day.

The Motion to be heard by the Court without a Jury was again made and the Court then entered an Order permitting the Defendant to be tried by the Court without a Jury and a written Order stating the reasons for the Court's

ruling has heretofore been entered and the case went to trial before the Court.

The Court gave the defense a continuing objection to all matters related to the introduction of the controlled substances and the facts as found by the Court relative to their introduction and the content of the Suppression Hearing is as follows:

Officer Eddie Railey, of the Kentucky State Police, Drug Section, and several other officers, among them Detective Glen Wood, of the Commonwealth Attorney's office, Detective Bevins of the Kentucky State Police, and about three more in the process of serving bench warrants and making numerous arrests on sealed Indictments on what might be called a "drug roundup", went to the residence of Marty Marquess at 1264 Adams Street, Bowling Green, Warren County, Kentucky, for the purpose of serving a bench warrant on Marquess for his arrest for the sale of Lysergic Acid Diethylamide; the sale having been made to undercover agents in this house and that going through the house they had seen a gun in Marquess' room but without knowing whether or not it was loaded and without having access to it.

On arriving there they were told that Mr. Marquess was not present. They entered the residence to look for Marquess themselves and found that those present were Dennis Sadler, who lived at the residence; Vanessa Cox; the Defendant, David Rawlings; Keith Northern; and Brenda Braden. The last two above named apparently had just arrived ahead of the officers. The officers went through the house looking for Marquess and in the process of doing so, noted a strong smell of marijuana smoke and in Marquess' room saw mariguana seeds lying on a mantel piece or some kind of a ledge or shelf. The officers determined to get a search warrant to search the house and Officer Railey and another officer left to go to the Courthouse to get a search warrant from the County Judge, the Honorable Basil Griffin. The other officers were left in charge and the persons above named in the residence were ordered to remain there pending the return of Officer Railey with the search warrant. The witnesses gave different times for how long it took for Officer Railey to get the search warrants, and these times ranged from 30 minutes to an hour. It is only about a six block drive from the site of this house to the County Courthouse and Officer Railey testified that upon entering the Courthouse he saw Morris Lowe, Common-

wealth's Attorney, and told him what happened and Mr. Lowe accompanied him to the County Judge's office where the County Judge saw them without delay. The search warrant was completed and they returned immediately to 1264 Adams Street.

The Court finds as a matter of fact and a matter of law that restraining the five (5) persons was not unreasonable or unlawful. The Court finds that the search warrants as issued as a matter of fact and as a matter of law is proper and adequate to legally authorize the officers to search the residence.

Northern and Braden, in the absence of Officer Railey, had voluntarily submitted to a search and had been permitted to leave.

Before starting search of the house, the officers told Vanessa Cox, Rawlings and Sadler, that they would search them before beginning the search of the building. Vanessa Cox was told to dump the contents of her purse on a table and in obedience to the order, dumped out the contents of her purse, including the items mentioned in the five indictments. She told the officers that they belonged to Rawlings and he acknowledged that they did and removed from the contents of Vanessa Cox's purse the things that belonged to him, including these controlled substances. Vanessa Cox did not object to the search then and does not object now.

The problem before the Court on the Motion to Suppress is to determine whether or not the exigencies of the circumstances as stated permitted the officers to search the parties before beginning a search of the residence for which they had a search warrant or would a search of the persons without a search warrant for their search be in violation of the 4th Amendment to the Constitution.

The Court finds that the officers were in a place where they had a right to be and that they had a right and legal authority to search the house pursuant to the search warrant, and that the exigencies of these circumstances in that knowing that this residence had been used for the sale of Lysergic Acid Diethylamide in the past and that there was a gun in the house; that their search of the premises had to do with the presence of contraband, the possession of which constituted a crime and that therefore a perfunctory search of the persons, including the contents of Mrs. Cox's purse, was permitted under the 4th Amendment to the Constitution and, as a matter of fact and common sense was a required procedure.

In the search of David Rawlings, the officer noticed a bulge in an inside breast pocket of his leather jacket, patted the outside, then reached inside the coat and pulled out a sum of money composed on one hundred sixty-one (161) bills bound together with rubber bonds which makes a packet approximately ¾ inch in thickness, which sum totaled Four Thousand Five Hundred ($4,500) Dollars.

The Court finds as a matter of fact and as a matter of law that the search of Rawlings was permissible under the exigencies of the situation presented and that the money was admissible into evidence.

Among other things found on the person of Rawlings was a knife that folded and was in a sheath fastened to his belt. It appears from the witnesses in the trial, but not in the Suppression Hearing, that this knife had been taken from Rawlings when he boarded an airplane to come to Bowling Green and that it was returned to him at the airport. One witness testified that the knife was 5½ to 6 inches in length and, when open, was approximately 10½ inches long. However, this was not offered in evidence as apparently this knife was taken over to the jail and, on Rawlings release pending trial, was returned to him. The knife or its place in evidence is not an issue in this case.

The Defendant introduced evidence at the Suppression Hearing to show ownership of the controlled substances for the purpose of showing standing to object to the search of Mrs. Cox's purse and the introduction of the contents of same as evidence. The Court having determined that the search of both Mrs. Cox and Mr. Rawlings was permissible and legal, the matter of standing is of no significance in this matter. However, the Court will address the matter of "Standing".

The Court finds it unbelievable that just of his own volition, David Rawlings put the contraband in the purse of Mrs. Cox just a minute before the officers knocked on the door. He had been carrying these things around Bowling Green in a bank deposit sack for days, either on his person or in his pocket, and it is unworthy of belief that just immediately before the officers knocked on the door that he put them in the purse of Vanessa Cox. It is far more plausible to believe that he saw the officers pull up out front and then elected to "push them off" on Vanessa Cox, believing that search was probable, possible, and emminent. But, even taking his word for this, items being placed in her purse simply for his convenience and which she did not ob-

ject to the search and does not object now, this Court finds that Rawlings is without standing, having established ownership to object to the search of the purse of Mrs. Cox.

The Court fully understands that the statements made by Rawlings at the Suprression Hearing as to ownership may not be considered by the Court sitting without a Jury in determining the guilt or innocence of David Rawlings in these cases.

The Court has considered the testimony of Vanessa Cox, who testified that she had seen the bottle containing the LSD and that Rawlings had offered to sell some to her; also that Rawlings had placed it in her purse. The testimony of Stallons, who testified that he had "seen the acid"; that Rawlings had offered to sell some to him; the testimony of Dennis Sadler, who had purchased one hundred of the tablets for One Hundred Sixty-five ($165) Dollars; this sale having taken place at the home of a man called Mark, who lives on the Nashville Road; and the testimony of Marty Marquess that Rawlings displayed a few of the pills to him, not a large quantity, and offered to sell him some for One Hundred Six-five ($165) Dollars; and after the items were dumped on the table at the search, Rawlings admitted to the officers that the items were his; and a witness from the Drug Laboratory of the Kentucky State Police identified all of the controlled substances as being, or containing, the contraband for which the Defendant Rawlings is charged. Under this proof, the Court finds the Defendant GUILTY as charged for possession of Lysergic Acid Diethylamide for the purpose of sale, and fixes his punishment at five (5) years in the penitentiary for trafficing in Lysergic Acid Diethylamide, and a fine of Three Thousand ($3,000) Dollars. KRS 218A. 990(2)

On the other Indictments there is no evidence that he offered to make any sales to anyone of these items and about the only person who had seen the other items, and she without knowing what they were, was Vanessa Cox, when they were placed in her purse.

THEREFORE, on Indictments Nos. 17108, 17109, 17110, and 17137, the Defendant, David Rawlings, is found GUILTY on the charge of possession of the items mentioned in the Indictments contrary to the Statutes provided, and his punishment is fixed as follows:

17108—Possesion of a Schedule III Controlled Substance, to-wit: Benzphetamine, and fixes his punishment at one (1) year in the County Jail and a fine of Five Hundred ($500) Dollars.
KRS 218A.990(6)

17109—Possession of a Schedule II Controlled Substance, to-wit: Methamphetamine, and fixes his punishment at one (1) year in the County Jail and a fine of Five Hundred ($500) Dollars.
KRS 218A.990(6)

17110—Possession of a Schedule III Controlled Substance, to-wit: Methyprylon, and fixes his punishment at one (1) year in the County Jail and a fine of Five Hundred ($500) Dollars.
KRS 218A.990 (6)

17137—Possession of a Schedule II Controlled Substance, to-wit: Penobarbital, and fixes his punishment at one (1) year in the County Jail, and a fine of Five Hundred ($500) Dollars.
KRS 218A.990 (6)

At the close of all the proof the Defendant made a Motion to Dismiss the Indictment No. 17107 of Lysergic Acid Diethylamide, on the charge that the Statute does not mention a drug "LSD", which is the term used in the Indictment. The purpose of a pleading, including an Indictment, is to advise the adverse party of the nature of the claim against him, or in the case of an Indictment, the criminal for which he is being charged.

The Term "LSD" is so familiar and its common meaning is Lysergic Acid Diethylamide. The Defendant knows and used this term; Defendant's counsel knows and used this; and certainly the Commonwealth's Attorney knows and used this, and the Lab man who tested the substance testified that the substance was Lysergic Acid Diethylamide.

THEREFORE, this Motion is OVERRULED.

This———day of February, 1977.

JUDGE, WARREN CIRCUIT
COURT DIVISION II

WARREN CIRCUIT COURT
Division II

Indictment No. 17107, 17108,
17109, 17110, and 17137

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

MOTION FOR NEW TRIAL

Comes the Defendant, David Rawlings, by counsel, and moves the Court for a new trial for the following reasons:

1) The seizure of the Defendant, David Rawlings, and of Vanessa Cox while Eddie Railey procured a search warrant was unreasonable and in violation of the Constitution of the United States.

2) The search warrants issued in this case did not authorize the search of Vanessa Cox or David Rawlings.

3) The search of Vanessa Cox's purse was not pursuant to a consent of Vanessa Cox, but by order of her captors.

FOR ALL OF THE FOREGOING REASONS, the Defendant respectfully prays:

1) That the Judgment should be arrested.

2) That the verdict should be set aside, and the Defendant ordered acquitted.

3) That in the alternative, a new trial should be ordered.

Dated this 14th day of February, 1977.

Kelly Thompson, Jr.
Counsel for Defendant,
David Rawlings

CERTIFICATE:

This is to certify a true copy of the foregoing was this day served upon the Honorable Morris Lowe, Commonwealth Attorney and Honorable Ron Parry, Co-Counsel for the Defendant.
Kelly Thompson Jr.

WARREN CIRCUIT COURT
Division II

Indictment No. 17107, 17108
17109, 17110, 17137

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

JUDGMENT

The defendant being present in open court with his attorney(s), KELLY THOMPSON, JR; it appearing from the record that a Motion and Grounds for a New Trial was timely made and filed and is now pending, the Court having heard argument on the Motion and Grounds, and the Court being sufficiently advised, IT IS HEREBY ORDERED that said motion be OVERRULED.

Attorney(s) for the defendant having then made a Motion for Probation, and the Court being sufficiently advised;

IT IS HEREBY ORDERED that said Motion for Probation is OVERRULED.

The defendant having been then asked if he has legal cause to show why judgment should not be pronounced against him and upon advice of counsel, none being shown, IT IS ADJUDGED that the defendant be taken by the Sheriff of Warren County to the Jail of Warren County and from there by the Sheriff of said county transferred to the Department of Corrections and to remain in custody for a period of *5 years and $3,000 fine on #17107, 1 year in county jail* and $500 fine on #17108. 1 year in county jail and $500 fine on #17109, *1 year and $500 fine on #17110, and 1 year in county jail and $500 fine* on #17137 (The 4 year total in county jail is to run concurrently with the 5 year penitentiary sentence.), and the Sheriff of said County shall transfer the defendant to the custody of the Department of Corrections at such location as the Department shall designate.

The defendant having then moved the Court to set a bond for appeal;

( ) IT IS ORDERED that appeal bond be set at $5,000 Cash bond.

( ) IT IS ORDERED that said Motion be OVERRULED.

Entered this 11 day of MARCH, 1977.

JUDGE, WARREN CIRCUIT COURT DIVISION II

The defendant is to be credited with 32 days jail time.

WARREN CIRCUIT COURT
Division II

Indictment Nos. 17107, 17108, 17109, 17110, and 17137

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

NOTICE OF APPEAL

Comes the Defendant, David Rawlings, by Counsel, and gives notice that appeals from the verdict rendered by the Warren Circuit Court, Division No. II, on February 11, 1977, and from the Order overruling the Defendant's Motion for a New Trial entered by the Warren Circuit Court on March 11, 1977.

Kelly Thompson, Jr.
Attorney for Defendant

WARREN CIRCUIT COURT

Indictment Nos. 17107, 17108,
17109, 17110 and 17137

COMMONWEALTH OF KENTUCKY,

Plantiff

vs.

DAVID RAWLINGS,

Defendant

Suppression Hearing
Transcript date: November 29, 1976

WARREN CIRCUIT COURT
Division II

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RAWLINGS

Defendant

SUPPRESSION HEARING

On Friday, November 29, 1976, a hearing was held before the Honorable J. David Francis, Judge, Warren Circuit Court Division II, in the above-styled case at 2:00 P.M.

Appearing on behalf of the Commonwealth was the Assistant Commonwealth Attorney, Hon. Michael Caudill. Appearing on behalf of the Defendant was Hon. Kelly Thompson, Jr., 410 East 11th St., Bowling Green, Kentucky.

THE PROCEEDINGS WERE AS FOLLOWS:

MR. THOMPSON: Your Honor, it's our contention that the search warrant which was used to search the person of the defendant and of another person—I believe Officer Railey's here to testify, but I think we might be able to reach a stipulation.

THE COURT: You're questioning the search warrant?

MR. THOMPSON: Yes sir.

THE COURT: Now, this has to do with five indictments.

MR. THOMPSON: Your Honor, in this case, this search warrant was procured for the premises of—

THE COURT: Let me just read it. This has to do with Lawrence Marquess. He lived in the house?

MR. THOMPSON: Yes Judge.

THE COURT: And the warrant is to search the premises at 1264 Adams Street. All right, now, make your argument.

MR. THOMPSON: Your Honor, it's the contention of the defense that a search warrant authorizing the officer to search a certain premise—

THE COURT: House

MR. THOMPSON: House, is not an authorized search of the people present in that house such as if you gave me a warrant to search—

THE COURT: Give me a case.

MR. THOMPSON: Right here, Your Honor. This goes back, Your Honor, to the Constitution where it says that a search warrant particularly describes the persons and places to be searched, and there's two more old cases. It goes back—those are the old ones. I'll show them to you for general knowledge. Those are the two cases cited continually on this issue.

THE COURT: Did you see this?

MR. CAUDILL: Yes sir.

THE COURT: All right, gentlemen.

MR. CAUDILL: Your Honor, I would like to put Mr. Railey under oath so I may qualify this thing.

EDDIE RAILEY, having been first duly sworn on oath, testified as follows:

DIRECT EXAMINATION BY: MR. CAUDILL

Q1 State your name and occupation.

A Eddie Railey, Narcotics Agent, Kentucky State Police.

Q2 All right, Officer Railey, on October the 18th, 1976, did you have in your possession an arrest warrant for one Lawrence Marquess?

A Yes sir, I did.

THE COURT: Arrest warrant?

MR. CAUDILL: Arrest warrant, yes sir.

Q3 And for what offense was Lawrence Marquess charged with on that date?

A Trafficing in LSD.

Q4 All right, and what—would you tell the Court about the offense that Lawrence Marquess was charged with?

A Well, I wasn't a witness to the offense, but he sold a quantity of LSD to an undercover agent, State Police Officer, by the name of John Bruce at a date before this time at this house on 1264 Adams Street in Bowling Green.

Q5 And this is the same house that you went to at a date with the arrest warrant; is that correct?

A Yes sir.

Q6 Now, who was the—with you when you went to execute the arrest warrant?

A Detective John Bruce, Detective Terry Barnes, Vincent Noble, Don Bivens, and—

Q7 Just to the best of your memory.

A All right. There was two or three others that came in.

Q8 Who entered the house first when you were armed with the arrest warrant?

A I did.

Q9 And upon entering the house, what did you observe?

A As soon as I entered the house, I entered into like a foyer, and I smelled marijuana in the house, and I could see people off to the right. I went in the direction of the people and asked if Mr. Marquess was present, and they said, 'no, he wasn't.'

Q10 And what did you do upon them telling you that he was not present?

A I continued to go ahead and look through the house, walked back to the kitchen in a circle, and came back through all the rooms of the house looking for Mr. Marquess to make sure he wasn't hiding in the house.

Q11 How many people were in the house when you arrived excluding the officers that were involved in the arrest?

A Five.

Q12 And who were these people?

A One was Dennis Sadler, the other Vanessa Cox, David Rawlings, and the other two; I don't have their names written down.

Q13 I believe Keith Northern and Linda Braden.

A That's correct.

Q14 All right. Where in the house did you smell marijuana smoke?

A When I first entered the house I smelled it and smelled it on into the living room, and Mr. Sadler's bedroom was kind of between the living room and the entrance, and I could smell it all in that area.

Q15 Did you see any marijuana or seeds in the house?

A As I came back through one of the bedrooms, I noticed what looked like some seeds laying on a mantle in one of the bedrooms.

Q16 Now, Detective Railey, at this point, what did you do when you smelled the marijuana and saw the seeds?

A I advised some of the other officers that were there to stay there while I came to the courthouse and obtained a search warrant.

Q17 And what did you obtain a search warrant for?

THE COURT: Wait a minute. Is the search warrant I have just looked at and examined, is that the search warrant you obtained?

MR. RAILEY: Yes sir.

MR. CAUDILL:

Q18 Now, after you got the search warrant and returned

to the house, how much time are we talking about from the time you left the house until the time you got back?

A Approximately 30 minutes.

Q19 When you got back at the house, what is the first thing you did?

A As soon as I walked into the living room area where most of the people were at, I think maybe Mr. Sadler had stepped into a bedroom, I asked that everyone come into the living room.

Q20 What was your purpose for doing that?

A To have the people in one place, and I wouldn't have to repeat it twice. I read the warrant, search warrant, to all the people that were there. Another female was in the house that wasn't there whenever we first went in. She was there at that time, and—

Q21 Now, I'll ask you this. After you read the search warrant, where was Vanessa Cox sitting in that room?

A She was sitting on the couch next to David Rawlings.

Q22 And where was the purse that these drugs were found in? Where was it located?

A On the couch.

Q23 Now, did you search any of the house before you patted down any of the people that were in the house?

A No sir, I did not.

Q24 Did you conduct a pat-down search of the persons that were in the house?

A Yes sir, I did.

Q25 Did you believe that your safety or the safety of anybody else in the house might have been endangered at that point?

A Well, I felt like after I advised these people that we had a search warrant and advised them of their rights that some of them might have fear of being arrested, and I felt like I might need to search those persons.

Q26 Why did you think that you might be endangered at this point?

A Well, I always search everyone that I arrest or prior to their arrest if I think they might be dangerous to myself or other officers.

Q27 Was this purse within reach of both Vanessa Cox and the Rawlings defendant?

A Yes sir, it was.

Q28 All right, and was the search for weapons prior to this?

THE COURT: Excuse me, would you ask the officer to describe the purse a little better?

MR. RAILEY:

A It was just a leather purse.

MR. CAUDILL:

Q29 How big was the purse?

THE COURT: Just a regular ladies purse?

A Yes sir, a ladies purse, leather purse. Oh, it's probably no bigger than—it's not quite as big as this notebook tablet.

THE COURT: Let the record show that he's demonstrating a regular ten by twelve looseleaf notebook.

MR. RAILEY: It was probably smaller than that.

MR. CAUDILL:

Q30 Was it large enough to where a small caliber pistol could have been hidden?

A Yes sir, it was.

Q31 Did you reasonably believe that there could have been a pistol in this purse or on any of the subjects in the house?

A Well, I didn't know whether it was or wasn't. I patted these people down to make sure there wasn't any.

Q32 Was that your specific purpose for patting them down?

A Yes sir.

Q33 Now, if you would, tell us what was found in the purse?

A In the purse was a large quantity of LSD, benzphetamine, hashish, methamphetamine, and phentabarbital, I believe it was.

Q34 How much LSD was in the purse?

MR. THOMPSON: We'll stipulate there was drugs in the purse.

MR. CAUDILL:

Q35 How much LSD was in the purse?

A Approximately 1800 tablets.

Q36 In your experience as an officer, is this an unusually large amount of LSD?

MR. THOMPSON: Does this have to do with suppression?

MR. RAILEY:

A This is the largest amount of LSD that I've ever seen at one place at any given time.

Q37 Did it give you cause for alarm to protect such amount of drugs?

A Yes sir, it did. This would be worth several thousand dollars.

Q38 Approximately how many thousand?

A Six or eight thousand on the street.

Q39 All right, sir, now what—how did Vanessa Cox react when you first found this in her purse? What did she do?

A She acted startled, of course, and we asked her if these things belonged to her, and she looked at Mr. Rawlings as if she didn't know what to say to us.

Q40 Did she look at anybody else in the room?

A She looked at me.

Q41 And Mr. Rawlings?

A Right.

Q42 At this time did you conduct a pat down search of Mr. Rawlings?

A Yes sir.

Q43 And what was your purpose for searching him?

A For weapons or anything else that he might have that would be illegal.

Q44 Now, Officer Railey, when you patted down Mr. Rawlings, what is the first thing you came upon?

A Well, the very first thing I noticed, I reached up here to pat his chest, and I felt a large bulk in his coat, and I reached under his coat, and as soon as I got ahold of what this was, I could, you know, I thought it was money, and I pulled it out, and it was $4,500 in cash in his coat pocket, and that was the only, you know—there wasn't any weapons or drugs on Mr. Rawlings.

Q45 Now, these searches of Vanessa Cox's purse and Rawlings person, they were searched for the purpose of finding out if there were weapons upon them.

A Yes sir.

Q46 You had previously been to this house before when you went in with the arrest warrant?

A Yes sir.

Q47 Why at that time did you not search for weapons?

A Well, I didn't think that anybody there had any alarm to cause us any danger. I didn't think they were alarmed, they weren't fearful of being arrested at that particular time.

Q48 But as you stood there with a search warrant, did you believe this gave them cause to be alarmed?

A I most certainly did.

Q49 And is this why you made this protective search?

A Yes sir. Every person in the house was searched.

Q50 Were they all searched before you searched the house?

A Yes sir.

Q51 Tell the Court what else was found in the house.

A Well, I don't have everything written down here in front of me exactly.

MR. THOMPSON: That's not the subject of this hearing.

MR. RAILEY:

A Cocaine, some other quantities of LSD in the rooms. We found methaprylan, amphetamines, marijuana scales, I found some marijuana on one of the persons that was arrested in the house; Mr. Sadler. I found a marijuana pipe and marijuana in his rear pocket and several other items.

Q52 Now, Detective Railey, before you conducted the pat down search and the search of the house, did you advise everybody in the house of their rights?

A Yes sir. Everybody was advised of their rights.

Q53 After finding the drugs in the purse and the money on Mr. Rawlings, were any statements made by either Vanessa Cox or Mr. Rawlings?

A Yes sir. I asked—after I saw this money and all the drugs in her purse, it hit me that, you know, she was indicating that these drugs belonged to Mr. Rawlings, and with him having this large sum of money, it appeared to me that possibly what she was saying was true that he had put these things in her purse. And she gave us a written statement in the house that Mr. Rawlings had put these things in her purse prior to us arriving there. And Mr. Rawlings stated to me two or three times that he did put it in there, but he didn't want to give any written statements. And then I think about the last time I asked him if he would give me a written statement as to putting this stuff in her purse, he said, 'would it help her? Would it keep her from getting in trouble?' And I said, 'I don't know.'

THE COURT: Is she indicted?

MR. CAUDILL: No, sir, she's indicted under sealed indictments, but she'll not be tried at this time.

MR. RAILEY:

A And he indicated to me two or three times that—

THE COURT: Is she going to testify?

MR. CAUDILL: Yes sir.

MR. RAILEY:

A He indicated that these drugs belonged to him but he wouldn't give me any written statements or anything until he saw his attorney.

MR. CAUDILL. On the basis of Detective Railey's testimony, I would argue to the Court that Mr. Thompson's cases are not applicable to the case of the bar.

THE COURT: He might like to cross examine.

CROSS EXAMINATION BY: MR. THOMPSON

Q1 Mr. Railey, you remember a preliminary hearing in the County Court in this case?

A Yes sir.

Q2 Do you remember me asking you if you were in fear of your life at that time?

THE COURT: Excuse me, was there a preliminary hearing held in whose Court?

MR. THOMPSON: Judge Griffin's Court, Your Honor.

Q3 Do you remember me asking you if you were ever in fear of your life?

A I don't remember whether you asked me that or not.

Q4 And do you remember your answer?

A Evidently I don't because I don't remember.

Q5 Mr. Caudill was present fortunately for us. Mr. Railey, how come none of this was mentioned?

A I wasn't in fear of my life. If I had been, I would've had my guns drawn, but I had a certain amount of caution.

MR. CAUDILL: He said he was concerned for his safety.

MR. RAILEY:

A I wasn't thinking I was going to be killed right at that instant, but I was concerned with my safety.

MR. THOMPSON:

Q6 Could you explain why none of this justification was brought up at that preliminary hearing?

A I answered the questions that I was specifically asked.

Q7 Let's get this straight. You came into the residence and found the people.

A Correct.

Q8 And you told them to wait there until you got back with a warrant; is that correct?

A I didn't tell them anything.

Q9 Did they try to leave?

A No, they didn't. I told the officers that were there to stay while Det. Bruce and I came to the courthouse and obtained a search warrant. Apparently, if they were asked, apparently the other officers told them they had to stay until we got back.

Q10 Two individuals got to leave; is that right?

A They weren't there when I got back.

Q11 Is it your understanding that if every individual would consent to a search of their person, they would be aloud to leave, and if not, they would have to wait for you to return?

A That's what I was told.

Q12 During this 45 minutes that all these individuals were there, nobody was in fear of their life?

A I think it was maybe 30—

Q13 You testified 45 in the preliminary hearing.

A Well—

Q14 During this time you were gone, all these individuals sat around with the officers waiting?

A Apparently these people weren't—we didn't suspect that they were fearful of being arrested or anything like that.

Q15 So suddenly after 30 minutes of being detained by officers, you are suddenly in fear of your life enough to search them?

A When we obtained a search warrant, we search them.

Q16 Did you search them because you had a search warrant that you thought would allow you to?

A No.

Q17 Why did you search?

A Because we had a search warrant, and if we found any narcotics in the house, the person would be arrested and advised of their rights, and I felt at that time that they were or could be a danger.

Q18 Are you changing your testimony now from the preliminary hearing and saying that you were not searching—

A No sir, I'm not. I might say that I was searching for weapons, and, of course, I found marijuana on Mr. Sadler, and I charged him with trafficing in marijuana. I was confiscating money off Mr. Rawlings, and that wasn't weapons. These things were incident to the search.

Q19 Why did you make this search again?

A I made the search because I was in fear, you know, I thought these people might have weapons or contraband, you know.

Q20 After 45 minutes, did you then suddenly—

A I wasn't there those 45 minutes or 30. I was only there for a very short time; long enough to walk through the house, and then I left.

Q21 When you returned, you were in fear of your life?

A I was going to be there for some time, yes.

MR. THOMPSON: I have no further questions.

MR. CAUDILL: I have some more questions.

RE-DIRECT EXAMINATION BY: MR. CAUDILL

Q1 You have explained that the reason you were scared when you came back was because at that time the people

knew that they could be searched, and, obviously, there were very many drugs in the house, have you noticed in your experience as a law enforcement officer that people who deal in drugs usually are armed?

A Yes sir, many times they are.

Q2 As a matter of fact, in the large marijuana case that was a week or two ago, they were armed with a 357 magnum in an automobile?

A Yes sir, I'd say the majority of cases we go on, we find some type of weapons.

MR. THOMPSON:

Q1 Were there any weapons found?

A Well, Mr. Rawlings had a knife strapped on his side.

MR. CAUDILL:

Q Mr. Rawlings had a knife strapped on his side?

A Yes sir, he did. He had a scalpel like with a knife on his side. I had forgotten all about that.

Q He did have a knife on him?

A Yes sir, he had one in a leather thing on the side, you know. That's the first thing I took off if him was a knife. I had forgotten all about that.

Q Because he had this knife on him, did this give you any reason to believe that there might be ay other weapons available?

A You know, I was a police officer also looking for weapons or contraband or whatever that's illegal.

MR. THOMPSON:

Q This is awful strange. You were using the search warrant to justify the search until I found the cases that throw that out.

MR. CAUDILL: No, Mr. Thompson, I resent you saying that.

MR. RAILEY: I had completely forgotten that he had a knife on him.

MR. CAUDILL: Now, Judge, based on this testimoney, I would argue that these officers could reasonable or were reasonably in fear of their safety when they found a large amount of LSD on Vanessa Cox. I believe that officers should be allowed some latitute when they go into a house full of people who they never seen before and have evidence that there are drugs there and have evidence that there was an LSD buy made out of that very house. One of the defendants was armed at this time.

I believe on the basis of *Terry vs. Ohio*, and on the basis of *Phillips vs. Commonwealth*, it's quoted, Judge, in here,

this opinion is based on it. I do not have it. I do have *Bayes vs. Commonwealth*, which is a 1972 case, and I think they make mention to the fact that officers are allowed reasonable latitude when they reasonably believe that they are—that their safety is jeopardized or safety of others.

In the alternative, I would argue that if the Court finds this was an illegal search that MR. Rawlings has no standing to object to this search, he was not in possession of the purse, nor was this purse under his custody or in his control. I would also cite to the Court and give to the Court numerous Kentucky cases.

THE COURT: When the contraband was found, it was in the purse owned by Vanessa Cox; is that right?

MR. CAUDILL: Yes sir.

MR. THOMPSON: Let's get a ruling on whether Judge believes that the search was justified by a fear on the officer's part.

THE COURT: All right, gentlemen, now you've got a case here; *Bayes vs. Commonwealth*. I know you have got two points there. Let me ask the officer now, just looking at the practicalities here of your carrying on your search.

The first time you went in the house, you determined who was there?

MR. RAILEY:

A That's right.

Q Did you have their names when you came down to the County Judge?

A No sir, I did not. I just walked through the house. I wasn't in the house probably a minute or minute and a half. I smelled the marijuana, and I wanted to get a search warrant and get back as soon as possible. And I didn't get their names and so forth, and I left them where they couldn't escape without getting their names or something.

Q What I was getting at was the reason for not getting a search warrant for these people just at the same time.

A I didn't know that it didn't say persons on there. I thought it did. Probably a mistake on my part.

Q Who made out that search warrant?

A Morris Lowe and Judge Griffin witnessed it.

THE COURT: Gentlemen, I'm going to take this under advisement this afternoon, but I'll give you an opinion on it early in the morning.

HEARING ADJOURNED

WARREN CIRCUIT COURT

Indictment Nos. 17107, 17108,
17109, 17110 and 17137

COMMONWEALTH OF KENTUCKY,

Plaintiff

vs.

DAVID RAWLINGS,

Defendant

Suppression Hearing
Transcript date: December 1, 1976

WARREN CIRCUIT COURT
Division II

COMMONWEALTH OF KENTUCKY

Plaintiff

vs.

DAVID RALINGS

Defendant

SUPPRESSION HEARING

On December 1, 1976, at 4:45 P.M., a Hearing was held in the above-styled manner before the Hon. J. David Francis, Judge, Division II of the Warren Circuit Court.

Appearing on behalf of the Plaintiff was the Hon. Michael Caudill, Assistant Commonwealth Attorney.

Appearing on behalf of the Defendant was the Hon. Kelly Thompson, Jr., 410 E. 11th Street, Bowling Green, KY, and the Hon. Ron Parry, Suite 200, Laywery Bldg., Newport, KY.

THE PROCEEDINGS WERE AS FOLLOWS:

MR. THOMPSON: All we seek to do at this time, Your Honor, is introduce the testimony of the defendant.

THE COURT: Because the fact that we feel it's necessary for us to establish a possessory interest in the items that were seized in order for us to have standing to chal-

lenge the seizure of these things. These were seized from another person other than the defendant.

MR. CAUDILL: Judge, he doesn't have a possessory interest in the lady's pocketbook. That was the thing searched.

MR. PARRY: Your Honor—

THE COURT: Mr. Thompson, you're going back into the same thing I've ruled on, and I remind you gentlemen you have rights of appeal, but just to keep arguing the same thing before the same Court, it's going to come to an end.

MR. PARRY: Your Honor, I believe that the law is that he doesn't have to have a possessory interest in her pocketbook, but the items seized, and that's all we seek to do is introduce—

THE COURT: Well, I believe I'll hear you on that, but I think you're wrong about it.

MR. CAUDILL: Judge, when his client takes the stand, he's fair game for all cross examination. And may we keep one agent here with us; Officer Railey?

THE COURT: Yes sir.

MR. PARRY: Your Honor, this has raised another question. It's my understanding of the law that the Commonwealth attorney would only be permitted to cross examine the defendant on matters pertaining to the things raised in the suppression hearing, not as to other matters.

MR. CAUDILL: Judge, I point out that if he's going to claim ownership of these drugs, I've got a right to explore that. Where he got them, how he came about them to develop his ownership.

THE COURT: But what I'm getting at, I want to be sure that I clearly understand and you clearly understand that that doesn't mean that this defendant necessarily has to take the stand in his own defense.

Now, do you gentlemen have any objection to Mr. Ralings, the boy's father, being here?

MR. CAUDILL: No sir.

DAVID RALINGS, having been first duly sworn on oath to tell the truth, testified as follows:

DIRECT EXAMINATION BY: MR. PARRY

Q1 State you name.
A David Ralings.
Q2 Your home addresss, Mr. Ralings.
A 107 North Ft. Thomas Avenue, Ft. Thomas, KY.
Q3 How old are you, David?

A Twenty-one.

Q4 On the 18th day of October, 1976, were you arrested in Bowling Green, Kentucky?

A Yes sir, I was.

Q5 And previous to the time that you were arrested, were you searched? Was your body searched?

A Before I was arrested?

Q Yes sir.

A No sir.

Q5 Was it after you were arrested that you were searched?

A Yes sir.

Q7 And at the time, where were you at when you were arrested?

A I was in—when I was arrested, I was sitting on the couch in the living room.

Q8 Is that in Bowling Green, Kentucky?

A Yes sir.

Q9 Is that 1264 Adams Street?

A Yes sir.

Q10 Was a young lady by the name of Vanessa Cox in or near you at that time?

A Yes sir.

Q11 In the residence?

A Yes sir.

Q12 At that time, did she have in her possession a quantity of controlled substances?

A Yes sir, she did.

Q13 Did you own any of these controlled substances?

A Yes sir.

Q14 Which of these controlled substances did you own?

A The LSD, the—I don't know the names for them.

Q15 Tell the Court what they look like.

A The LSD, the yellow and orange pills, I believe they refer to them as methaamphetamine, and there was two yellow capsules.

Q16 And other than the LSD, you don't know the chemical names or chemical compositions of these items that you claim you own?

A No sir.

Q17 How did they come to be in the possession of another person?

A I was—when we were getting ready to go pick up Vanessa Cox's car which was getting worked on, and on our way out the back door, I asked her if she would carry this for me, and she said, 'yes,' and they were placed into her

purse, and then right then at that time some people came in the back door, and I went to the restroom, and then the knock came on the front door.

Q18 My question was how did these get to be in her possession? Is it your testimony that you gave these to her?

A Yes sir.

Q19 You are charged with trafficing in methaamphetamines. Do you claim you own the methaamphetamines?

THE COURT: Excuse me, refer to those by indictment number, please.

MR. PARRY: Indictment no. 17109, you were charged with trafficing in methaamphetamines at the time you were arrested and immediately prior thereto, did you own the methamphetamines?

A Yes sir.

Q20 And Indictment no. 17107, you were charged with trafficing in amphatamines. Did you own them at that time?

A I don't know which pills they are referring to as amphetamines.

MR. CAUDILL: That indictment has been dismissed.

MR. PARRY:

Q21 Okay. And indictment no. 17108, you are charged with benzphetamine. Do you know what that is?

A I don't believe I know what that is.

Q22 Did you own a substance commonly known as diadrex?

A No sir, I didn't.

Q23 And indictment no. 17107A, you are charged with trafficing in phentabarbital. Did you own the phentabarbital at that time?

MR. CAUDILL: 17107 is LSD.

MR. PARRY: 17107A. Did you own that?

A Your Honor, is there any way I can see these? I don't recognize the name.

MR. CAUDILL: Judge, I'll just spread these drugs out here, sir. I think we're going to need our chemist in here to identify this stuff.

MR. THOMPSON: It's very simple. He allegedly possesses all the drugs except the ten pink ones marked 'Upjohn, and—

MR. PARRY: Mr. Caudill, can we stipulate what is said on the first page of the Bill of Particulars as to the items seized from the purse?

MR. CAUDILL: I'd rather not stipulate anything at this time until we go through this stuff and take a good look at it.

MR. PARRY: Are you indicating that what you've provided for us on the Bill of Particulars may not be correct?

MR. CAUDILL: There's a possibility of that, yes sir.

THE COURT: Go ahead, gentlemen.

MR. PARRY:

Q24 Now, Mr. Ralings, on this Bill of Particulars on the first page, it indicates that Vanessa Cox, who was present, was searched and was found with the following controlled substances. Number one is 1800 LDS tablets in a bottle, eight other LSD tablets is another container. And 100 other tablets of LSD in another container. Now, do you allege that you owned on October 18, 1976, all the items described under No. 1 in the Bill of Particulrs?

A Yes sir.

Q25 Number two is 200 tablets methaamphetamine. Do you allege that on that date you owned those?

A Yes sir.

Q26 Number three is ten tablets benzphetamine. Do you allege that on that date you owned those?

A No sir.

Q27 You did not?

A No sir.

Q28 Do you know who those belonged to?

A I believe Vanessa Cox has a prescription for them.

Q29 Okay, number four is three capsules phentabarbital.

A Yes sir.

Q30 You owned them?

A Yes sir.

Q31 Number five, two capsules methyprylan. Do you allege that you owned those the date and time I mentioned?

A Yes sir.

Q32 Mr. Ralings, on that date, the time the police arrived there, and after that, up until the time that you were placed in a jail, did you ever do anything to indicate that you had any intention of harming anyone?

A No sir.

Q33 Would you tell us how you were detained and what actions you went through on that day the police arrived?

A I was in the restroom at the time of the knock on the door, and I answered the knock on the door. I said, 'who is it?' And someone said, 'the State Police.' And I pulled the curtain back to look, and I believe officer Railey or one of the other arresting officers showed me an identification, the badge. And I went to open the door, and I couldn't get it

open, and I said, 'I don't know how to open this door, I don't live here.' And I said to Dennis who was in the other room—

Q34 Dennis who?

A Saddler. I said, 'The state police are at the door.' And he came over and he said that he couldn't open the door and asked them to use the back door. And then one of the officers outside said, 'Open it up or we're going to kick it down.' So I just stepped back, and the next thing I knew the police were inside. And I was in the hallway, and they asked if I was Marty Marquess. I said 'no,' and they asked me who I was. I told them. They asked everybody in the house if Marquess was around, where he was, and we all said we didn't know where he was. We assumed he was still at class. And they went through the house, looked for him, and they realized that he wasn't at home.

Then they placed us in the living room, and I asked why I was being held, and one of the officers said he smelled pot, he was going to go get a search warrant. And I kept asking why I was being held; I wasn't doing anything wrong. And they said, 'Just sit down.' You know, they sat us down in the living room and went and got a search warrant.

Q35 Were you at any time advised that you were under arrest?

A No sir, I wasn't.

Q36 Other than the officers using force to come into the premises, was there any other show of force either by the officers or by any other persons present?

A No sir, there wasn't.

Q37 Was there ever any threats of violence toward any of the officers?

A No sir, there wasn't.

Q38 Did any of the officers ever have to draw a weapon?

A No sir.

Q39 Did any of the officers ever have to use physical force to restrict the movement of the persons there?

A No sir.

Q40 Did you simply all just sit on the couch as you were told to do?

A I believe I was on the lefthand side of the couch, Vanessa Cox was to my right, Dennis Saddler was in one of the chairs, and there—Keith Northern, I believe his name is, was standing in front of the fireplace, and Linda Braden, I believe is her name, was sitting over on the righthand side of the room to me.

Q41 And how long did you sit there on the couch?
A I'd say a good 30 minutes.
Q42 What happened then?
A I asked if I could leave. I asked why I was being held there. They said they were going to get a search warrant, and then after I asked why I was being held there about thee times, two police officers came back into the room and said, 'if you all will consent to a bodily search, you can leave.'
Q43 Was this before or after the search warrant?
A Before.
Q44 And did you do that? Did you consent to a bodily search?
A No sir, I did not.
Q45 Did anyone else there consent to a bodily search?
A Yes sir.
Q46 And were they searched?
A Yes sir.
Q47 Were any weapons found?
A No sir.
Q48 Any large sticks?
A No sir.
Q49 Were they permitted to leave?
A Yes sir.
Q50 And what happened next?
A We sat around got a little bit longer, than officer Railey came back with a search warrant, read us our rights, read the search warrant, and then I was searched.
THE COURT: Excuse me, let me ask a question here. All these things we are talking about, none of them were found on this man's person? They were all found in the purse of Vanessa Cox?
MR. CAUDILL: Yes sir.
MR. THOMPSON: Money was found on his person. We have a motion to suppress the money also.
MR. PARRY:
Q51 Now, you were not searched prior to the time the search warrant arrived; were you?
A No sir
Q52 And did they exhibit to you the search warrant prior to the time they searched you?
A Officer Railey, I believe, was the only one that read it.
Q53 And after reading that to you he proceeded to search your person; is that correct?

A Yes sir.
Q54 And what did he find?
A Well, he patted me down, and found a quantity of money inside my coat pocket. He took it out and asked me what I was doing with it, and I told him, and then he placed it back into my jacket and continued to search the other people and then on to the premises.
Q55 And at that time did he arrest you?
A I had been arrested.
Q56 After he searched you, were you under arrest at that time immediately after he searched you?
A Well, he read the search warrant, and then he read the rights and then the search warrant, and then he searched me.
Q57 Okay, now, immediately following the time that he searched you, did he arrest you?
A Did he say I was—no sir.
Q58 Did he take anything at all from you.
A He took the money at first and put it back into my pocket.
Q59 Did he search Venessa Cox?
THE COURT: How was this money arranged? Was it in anything, just loose, or how?
THE WITNESS: There was a rubber band around it.
MR. PARRY:
Q60 David, did you have the same jacket on that day that you have on now?
A Yes sir, I did.
Q61 And that's a short length leather coat.
A Yes sir.
Q62 Now did any of the persons there have a weapon?
A No sir.
Q63 Did you have a knife?
A Yes sir, I did.
Q64 Where was that knife located?
A It was located on—I had it in a leather pouch on the outside. It was hanging from my belt on the outside of my coat.
Q65 Was that visible? Did any of the officers make any comment to you about what is in the pouch prior to the search?
A No sir.
Q66 And after the search, was the knife taken by the officers?
A Yes sir.

Q67 Was it at all visible from the pouch?
A No sir.
Q68 Is the pouch made for carrying a knife?
A yes sir, it is a leather pouch with a flip top on it that buttons down.
Q69 Is the knife completely enclosed in there?
A Yes sir.
Q70 And you didn't attempt to pull that knife or get in that pouch; did you?
A No sir.
Q71 Do you expect that Vanessa Cox's purse would be free from intrusion by these officers as you sat there?
MR. CAUDILL: He's calling for a legal conclusion.
THE COURT: He can answer it, but you are right about that. What he thought or didn't think or what he now says he thinks doesn't have anything to do with it.
MR. PARRY:
Q72 Did you feel that Vannessa Cox's purse would be free from the intrusion of the officers as you sat there? When you put the pills in her purse, did you feel that they would be free from governmental intrusion?
A No sir.
THE COURT: You know what, I believe this boy tells the truth. You all wanted to bring him in here and try him before the Court, and he said, 'no, I want a jury.' He said 'no, I don't understand that.' And I don't blame him for not understanding that. That's the first time I've ever seen such a thing brought on before this Court, and I've been here for quite a few years as an attorney, of course.
Now, no question but what the boy fully understood what was meant by that. None at all in the Court's mind. If you want to go ahead, you can do so.
MR. PARRY: Just a few more questions.
Q73 As you sat there with Venessa Cox next to you, where was the purse located?
A Between her and I.
Q74 And when officer Railey came with the search warrant and asked to search you or exhibited the warrant to you, did you stand up?
A No sir.
Q75Were you searched while sitting down?
ANo sir, while he read it, I was seated, and then he said to stand up; he wanted to search me.
Q76And how about Vanessa Cox; did she stand up to be searched?

A yes sir.
Q77 Did she pick up the purse or did the officer pick it up?
A I believe she picked it up.
MR. PARRY: No further questions.
MR. THOMPSON: Ask him if he expected the purse to be private.
THE WITNESS: Private? Yeah.

CROSS EXAMINATION BY: MR. CAUDILL

Q1 Did you consider that purse to be private for your personal possessions, Mr. Ralings?
A Well, I didn't expect her to go telling everybody.
Q2 You didn't expect her purse—First of all, you—did you own the purse, help to buy it or anything?
A No sir.
Q3 Did you make a habit of keeping things in her purse?
A No sir.
Q4 Had you ever kept things in her purse before?
A No sir.
Q5 Did you come to Adams Street with her on that day?
A Yes.
Q6 You came in the same car?
A Yes sir.
Q7 And whose car was that?
A Bob Stiles, I believe.
Q8 And what time did you arrive there?
A Approximately nine or ten in the morning.
Q9 And were you with her until this arrest?
A No sir, I wasn't.
Q10 When did you all split up?
A I waited there for her while she was at class—when she came back from after class.
Q11 So she left and went to class. Did she take her purse with her?
A I really don't know.
Q12 Did you put anything in her purse before she went to class?
A No sir.
Q13 When she came back, did she have her purse with her?
A I believe so.
Q14 What was her purpose for putting all these in her purse?
A I didn't want them to be seen.

Q15 Why not?
A Why not?
Q Yeah.
A It's not something you want people to see.
Q16 You know they are illegal then?
A Yes sir.
Q17 I show you approximately 2000 different tablets of LSD. First, I ask you where you got that LSD?
A Newport, Kentucky.
Q18 And when did it come into your possession?
A I don't recall.
Q19 Who did you get it from?
A Donald Booker.
Q20 And what was your purpose in obtaining that LSD?
A To give it to people that wanted it?
Q21 To give it to people that wanted it?
A Yes.
Q22 How much did you pay for it when you got it from Donald Booker0
A $110 for 100.
Q23 And was it your intent at that time to give it away to people who want it?
A To sell it to people that wanted it.
Q24 I show you approximately 200 methaamphetamine tablets and ask you where you got those.
A Same man.
Q25 Did you pay for those?
A Yes sir.
Q26 How much did you pay for them?
A $45 for 100.
Q27 What was your purpose in obtaining them?
A I took those
Q28 Now, I show you a bottle which has within it a little purple pill found to be LSD and also a capsule of pentobarbital and a capsule of methyprylan and ask you where you got thos substances.
A Everything but the pink and white ones, the same man. The pink and white one was given to me when I was down her in Bowling Green.
Q29 You disclaim ownership of the benzphetamine, and I hand you ten tablets of benzphetamine.
A Yes sir, I have never seen those before.
Q30 I show you several black balls and ask you if you can tell us what they are.
A I don't have any idea, but I can tell you where they came from.

Q31 Where?
A Vanessa Cox's purse.
Q32 Where does this man live that you got these things from?
A Newport, Kentucky.
Q33 What is his address?
A Seventh and Overton.
Q34 What does he do besides the obvious?
MR. PARRY: Your Honor, we are getting far beyond—
MR. CAUDILL: He has to prove ownership of these things.
THE COURT: I want to point out this is not before the jury. If you're going to recognize that the Court will treat it as a matter of law and not a matter of fact.
MR. CAUDILL:
Q35 What does this man do?
A I don't know. I only knew the man for approximately three weeks.
Q36 When did you first decide to come to Bowling Green with these sbustances?
A The—
MR. PARRY: Objection, Your Honor.
THE COURT: Overruled. This is a law question, I remind you.
THE WITNESS:
A The Monday before the arrest.
Q37 And how did you get to Bowling Green?
A I flew down.
Q38 And were they on your person when you flew down?
A On my person?
Q39 Yes.
A They were in the suitcase.
Q40 Were there any other drugs in the suitcase besides those?
MR PARRY: Continuing objection because I think what we're talking about is a search of the premesis a certain location of a certain date and time.
THE COURT: Stay as near the facts as you can, but If you've got some relevancy, I'm not going to limit you.
MR. CAUDILL:
Q41 How long was it before the officers got there that you put this in Vanessa Cox's purse?
A On our way out the back door apprximately three, five minutes before.
Q42 Who else was present when you placed it in her purse?

A I knew of three people present in the house before the knock on the door. When the knock came on the door, or before the knock came on the front door, we were on our way out the back door, and two people came in. I was in the restroom when they came in, and I didn't know who it was that was in the house because I was in the restroom when the knock came on the door.

I answered the door, and once the policemen were inside, I was back in the living room where they put me, and I saw everthing that went on in the house.

Q43 What was your purpose for going to that house that day?

A To wait for Vanessa Cox to get out of class.

Q44 Why were you waiting for her?

MR. PARRY: Objection, Your Honor.

THE COURT: That's where it ended up. Go ahead.

MR. CAUDILL:

Q45 Were you waiting for Vanessa Cox—why?

A We were going to pick up her car. Dennis Saddler was going to ride her and I to pick up her car.

Q46 And you were going to go with her?

A Yes sir.

Q47 Have you been dating her?

A I don't know if you would consider it dating her.

Q48 Explain to the Court exactly what the relationship is.

A I met her on a Wednesday night, the Wednesday prior to the arrest, and we talked, and we became friends, and I talked with her, and she talked with me.

Q49 So you're talking about a friendship type thing?

A Yes sir.

Q50 How did you know when you came to Bowling Green to come to this specific address on Adams Street?

A I had gone to school down here last semester.

Q51 Who did you know that lived in this house on Adams Street?

A I knew Dennis Saddler, and 1 knew Marty Marquess.

Q52 And were you staying in this house at this time?

A No sir.

Q53 Where were you staying?

A At Vanessa Cox's house on the couch.

Q54 Did you quote the price of this LSD to Mr. Saddler?

MR. PARRY: Objection, Your Honor.

A I don't recall.

THE COURT: How do you make that relevant?

MR. CAUDILL: He says it was his and in his possession, and the purpose he had was to sell it, why didn't he offer it for sale?

THE COURT: Overrule the objection.

MR. CAUDILL:

Q55 Did you offer it for sale to Mr. Saddler?

A I believe I did.

Q56 And what price did you quote Mr. Saddler?

A I don't recall the price.

Q57 How much did Mr. Saddler buy?

A I don't recall, three, five hundred.

Q58 Did you ever sell any to Vanessa Cox?

A No sir.

Q59 Did you ever sell any to Lawrence Marquess?

A Yes sir. Or no sir, no sir.

Q60 Did you ever sell it to anybody else after you got here in Bowling Green?

MR. PARRY: Objection.

The COURT: Overruled.

MR. CAUDILL:

Q61 Is there anyone else beside those people who you can tell us that you sold the LSD that you had in your possession?.

MR. PARRY: Objection.

THE COURT: Well, this is what all the argument's about. Overruled.

MR. CAUDILL:

Q62 Can you tell this Court anybody else that you sold this to or quoted a price to that can tell this Court you had that in your possession at any time?

A I believe there was one other person.

Q63 Who was that?

A I don't know his first name. He's referred to as Doc Harris.

Q64 Do you know where he lives?

A I don't know the name of the street. It's—okay, Scottsville Road comes in and goes around the sharp bend after you pass over the intersection.

MR. PARRY: 12th Street.

MR. CAUDILL:

Q66 What is the address?

A I don't know.

Q67 Describe this person.

A Tall, skinny, dark hair.

Q68 Where did you sell it to him, and where were you when you sold it to him?

MR. PARRY: Objection.

THE COURT: Overruled.

Q69 When did you sell it to him, and where were you when you sold it to him?

A I went to his house. I didn't sell it to him. It was to some other people that he knew.

Q70 Who did you sell it to?

A I don't know the people's names.

Q71 He was present when the sale was made?

A Yes sir.

Q72 Describe the house.

A It's right next to a florist type of a store.

Q73 On 12th Street?

A Yes sir.

Q74 And?

A And it's an apartment house. It's a wooden frame out front, and I believe, I'm not sure. It's maybe brick added on in the back, an extension.

Q57 And you did not have a car when you were here, how did you get there?

A Dennis Saddler loaned me his car one time.

Q76 All right. Now, you've testified that you had a knife on the day of the arrest; is that correct?

A Yes sir.

Q77 And you had a waist length coat on, and you were wearing the knife on your waist; is that correct?

A Yes sir.

Q78 And it was in a knife pouch?

A Yes sir.

Q79 All right. Do you know that these officers could not see that knife pouch?

A I didn't know.

MR. CAUDILL: That's all.

MR. PARRY: No more questions.

MR. PARRY: Your Honor, I think—I don't know how many cases Mr. Thompson sited to you, but—

THE COURT: He gave me a stack, and I read over every one of them.

MR. PARRY: —Brown vs. U.S., Jones vs. U.S., Butler vs. Commonwealth; all these cases hold—

THE COURT: I've returned them to you.

MR. PARRY: —that if you own something regardless of who happens to hold it for you, that you have standing challenges.

THE COURT: This is an awful gray area.

MR. PARRY: Now, everybody started jumping up down about him not having expectation of privacy, but that's an additional ground because that was enunciated in the case where a Union officer had union records seized from the Union office. He didn't own the building, and he didn't own the records, and it wasn't even a private office. And the Court said that he didn't have the standing to challenge it on the basis that—Dave does have ownership of the property, and he didn't have the standing to challenge it on the basis that it was his private office as some other case was set, but we are going to make a new rule here if you have a reasonable expectation of privacy there, then you can challenge it, but that's not a necessary showing in every case. The possession is all he needs to show, and in fact, I don't know even if it's necessary to come in here since the offense itself requires possession as a necessary owner.

Many cases I'm sure that Mr. Thompson said that—

THE COURT: I want to point out that it's your idea. I felt like I have had a pretty full day before we started.

MR. PARRY: I understand.

MR. CAUDILL: Your Honor, I'd like to point out that there's also a case called Walters vs. U.S., and in that case it says, 'where you have a factual situation where a co-defendant deposits drugs in another co-defendant's purse, that that defendant does not have standing to challenge the search because he does not have a reasonable expectation of privacy,' and this defendant himself has told the Court that he did not himself feel that he had a reasonable expectation of privacy in her purse.

THE COURT: Gentlemen, the Courts have decided this question both ways as you all well know, and several of them Mr. Caudill gave me, and I think you had given me a citation on one that I have a set of Kentucky Decisions at home that I read. This is a kind of gray area. I think you have made your record good, and I'm going to overrule your motion to suppress. We'll start trial Thursday morning at 10:00.

MR. THOMPSON: Your Honor, the issue of standing would not in any way effect the money that was on his person. He definitely has standing for the money?

THE COURT: Ya'll haven't argued that but very little. And the only thing I have passed on at this time is these pills.

MR. CAUDILL: Judge, I'd like to point out when we had this other hearing, this was justified on a search for weapons; pat down search.

MR. THOMPSON: He stated he knew it was money, and he saw it was money.

THE COURT: I recall he said it was a wad in the breast pocket or inside breast pocket, and that he reached in and pulled out the money, and he saw the money, and returned it.

MR. CAUDILL: Of course, I would like that record to be made part of the record.

MR. PARRY: Your Honor, it was my understanding that the searches of the person although they were not valid under the warrant, they were valid because the officers had some fear for their lives or something?

THE COURT: I have said that the search would be valid for weapons, but you gave it a preface that I didn't give it.

MR. PARRY: Okay, I'd like to cite to the Court the case of Terry vs. Ohio, and it's a stop and frisk case, the first one that enunciated the fact that a police officer can stop someone with less than probable cause, and that case says that the officer must be able to articulate some facts not just a mere hunch, but some fact to show the Court why he was afraid for his life. I don't know what the officers testified to, but it's my udnerstanding that he said he feared for his safety, and I suggest to the Court that the physical facts are exactly contrary to that because the people had done nothing but sat there for over a half an hour and waited.

THE COURT: Let me point out how much what you say is a contradiction. You say on one hand that Mr. Railey had no right to fear for his life when he's over here in a house on Adams Street, and yet at the same time when there were a few scattered people sitting back in the courtroom who were not interested in this case but were the parents of a girl in the preceding case and started to have this hearing up in front of the bench, and the Court—and the suggestion was that we retire to chambers here for fear of your client's life. So I don't know. I'm not going to say that— or I'm not going to rule that as a matter of law that an officer making a search of numerous people who one of them was carrying a, and the word is 'sheath' if you fellows will get your terminology straight, you carry a knife in a sheath, not a pouch, and I don't know where it is. I'd like to see it, and I don't know why you fellows didn't bring it today because

you know it's somewhat in issue here, and I've got a little knife I carry here that's a relic of the Southern Railroad that they let me board airplanes with.

From the way you describe it, I don't think they'd let Mr. Rawlings board an airplane with his knife in the sheath. Now, I don't know why the officers didn't arrest him for carrying a consealed deadly weapon or I'm just guessing what it is. But in any event, here is this fellow carrying a heck of a bunch of drugs with him. And I know that this other fellow is indicted. He hasn't been tried yet and I don't know, but there's a quantity insofar as the market's concerned. So I'm not going to hold as a matter of law that these officers didn't have a right to search for the weapons under the circumstances at all.

MR. THOMPSON: May I point out that you can't justify the search by hindsight.

THE COURT: This is what you want to do because they didn't find any weapons, they weren't entitled to search.

MR. THOMPSON: I'm talking about the situation they had to reasonable ground to believe there were weapons there.

THE COURT: Well, I'll let you fellows argue that to another Court.

MR. THOMPSON: One more point. The money that was on him, I've made a written motion to suppress the money because he does have standing in that area. And the warrant does not authorize the search of his body so we once again move for the suppression of the money which was found on his person.

THE COURT: Overrule.

Okay, the defendant has come back in front of the Court together with his lawyers, Mr. Parry and Mr. Thompson and his father, Melvin Rawlings. And they advised the Court that they want to renew their motino to have this case tried solely before the Court.

MR. PARRY: That's correct.

THE COURT: I might point out that when they walked in the room, Mr. Rawlings said that he wanted to see the Court, and the Court advised him that he ordinarily talked to the Court—or persons indicted or parties to Court actions through the attorneys, but then I saw that they were here so I had what he had to say. And at that time he himself advised me that he wished to be tried only by the Court.

What do you have in mind here, gentlemen?

MR. PARRY: We've discussed this at some length, and this is maybe the reason for Mr. Rawlings confusion before because we had talked about trying it before the Court and then trying it before the jury, and I think our final decision, mind and Mr. Thompson and the advice that we have given to Mr. Rawlings is that the case be tried to the Court rather than to the jury. I think he understands that, and I think the reason he gave you an ambiguous answer before was that we had talked about it so much one as opposed to the other, and he wasn't clear that we had made a decision. And I think he's clear now that our advice to him is to try it to the Court without a jury.

Now, have I misstated anything, Mr. Rawlings?

THE DEFENDANT: No sir.

MR. PARRY: Is this your intention—you know that you have a right to a jury, and not Mr. Thompson, myself, or anyone else here can take that away from you?

THE DEFENDANT: Yes sir.

THE COURT: Let me question him. Let me tell you a little about history. You know a long time ago, really, when our forefathers established this country and set up our form of government which guarantees some freedoms that people in some countries don't have, one of the main things that they established was that the state, and to an extent I represent the state in Bowling Green. This Judge of this Court can't just try somebody nor could the state if the Commonwealth's attorney in Bowling Green— they can't just prosecute someone without a jury. That's the accused person's peers making the decision themselves about whether or not a person is guilty. That's a very very precious freedom and a guarantee of freedom that we have in this country that more than half of the people in the words do not have.

Now, I appreciate your— you might feel like you're a rock in the hard place or whatever you want to say, but it's not a choice of one good and one bad but here; one bad and the lesser of two evils, and whatever that is. But you sure that you fully understand what you're doing? Now, you realize that in this suppression hearing you have told me already that you are really guilty of these charges except for the lgal entanglements of whether or not the matters, the pills and so forth can be exhibited to the jury at all. In other words, you've said to me that you owned these pills and that you sold some to, I believe somebody named Dennis Saddler and somebody out on Broadway or 12th Street or whatever, and the jury doesn't know that, and I just don't really know about that.

I'll be glad to hear— I'll only do this with the consent of the Commonwealth.

MR. CAUDILL: Your Honor, it's all right with us. This is just a compliment to you that they would even want to entrust it to your discretion, and we'll entrust it to your discretion also.

MR. PARRY: I think you realize that if there's a complete lack of evidence presented by the Commonwealth, and we don't anticipate that, but if there is that you cannot consider the evidence given in the suppression hearing.

THE COURT: I realize that.

MR. PARRY: But to the best of your ability as a human being to separate the two.

THE COURT: You realize that the old story about you can't unring a bell, and you can't come in here and tell me I owned these and had these and tommorrow say I didn't know about them.

MR. PARRY: So what we anticipate or what we have told Dave is that it's a very close question to inner sense of guilt and the fact that you are a human being and heard him in this suppresion hearing may tilt you over the other way toward guilt rather than innocence. On the other hand, we have told him if there's a complete lack of evidence, you know, you will put the evidence out of your mind, and that is our advice to him.

THE COURT: I want to hear from you Mr. Rawlings. You understand that you already in effect told me that were it not for the legal barriers for the introduction of the evidence, that you are guilty of these charges. Now, the jury doesn't know that. And I've ruled, you understand, that they are entitled to introduce these pills and this mondy into evidence. Now, if you want to take your chance with the Court rather than the jury—I realize that you're an intelligent young, man, and you're very ably represented by two competent lawyers, and your father being present as well, and the conversation I had with you before, you said you were 22?

THE DEFENDANT: Twenty-one.

THE COURT: Twenty-one years old, and I'm going to sustain your motion and let you be tried before the Court.

Now, this is a decision; right?

THE DEFENDANT: Yes sir.

MR. PARRY: Clarify if he admitted possession of the LSD for sale, speed for use, and he didn't know about the two of them.

THE COURT: I've got the one of them.
MR. PARRY: Did you know about the nodulars?
THE DEFENDANT: No.

HEARING ADJOURNED

OPINION RENDERED: February 17, 1978
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY
NO. CA-1185-MR

COMMONWEALTH OF KENTUCKY

Appellee

DAVID RAWLINGS

Appellant

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE J. DAVID FRANCIS, JUDGE
ACTION NOS. 17107, 17108, 17109, 17110 & 17137

AFFIRMING

* * * * * * *

BEFORE: HOWERTON, REYNOLDS and LESTER, Judges.

REYNOLDS, JUDGE. Appellant was found guilty upon trial in Warren Circuit Court and convicted of the possession of drugs for the purpose of sale. He maintains that the court failed to suppress evidence which resulted in violation of his constitutional rights.

On October 18, 1976 police officers, with an arrest warrant for Lawrence Marquees, entered his residence at 1264 Adams Street in Bowling Green. Upon entering the premises the officers found the appellant David Rawlings, Vanessa Cox, Linda Braden, Keith Northern and Dennis Sadler. The officers smelled marijuana smoke in the residence and observed marijuana seeds in plain view while searching for Marquees. Marquees, who was under indictment for trafficking in Schedule I controlled substances, was not found. The individuals found on the premises were requested to sit in the living room while some of the officers went to the nearby courthouse to obtain a search warrant. Two of the five individuals were permitted to leave after submitting to a search. Some 30-45 minutes thereafter the

departed officers returned with a search warrant for the premises. The warrant did not authorize a search of individuals on the premises. A purse, lying on the couch between Ms. Cox and appellant, was ordered to be emptied, and a large amount of controlled substances was emptied onto the table. Ms. Cox informed the officers that the drugs belonged to the appellant and told him to take what was his. Appellant admitted ownership of the drugs. Upon standing up he was observed to have a sheath containing a knife attached to his belt and a bulge was observed under his clothing. A pat down search revealed $4,500 under his clothing. He was placed under arrest. Prior to trial appellant moved for a suppression of the evidence and the motion was denied.

Essentially, he contends that he had standing to complain about the search of Ms. Cox's purse; that the search of Ms. Cox's purse was not authorized by the warrant, based on probable cause, or justified by the exigencies of the circumstances involved; that the search warrant for the premises did not authorize the search of all persons on the premises; and that their detention was not based upon probable cause and was, in effect, unreasonable restriction of their freedom.

We hold that the appellant, to utilize the exclusionary rule, must have standing to challenge the constitutional violation which serves as the basis of the law's application. Before *Jones v. United States*, 362 U.S. 257 (1960), the Constitution was interpreted in such a manner that the 4th Amendment protected only places and things. If there was no proprietary interest, there was no standing granted to claim a violation of constitutional rights. *Jones, id.*, established automatic standing for one charged with a possessory crime. Anyone who was legitimately on premises where a search occurs may challenge its legality by a motion to suppress where the evidence is going to be used against him. There was no allegation in this case that appellant was not legitimately on the premises. *Simmons v. United States*, 390 U.S. 377 (1968), filled a void remaining after the *Jones, supra*, decision. *Simmons, supra*, provides that when a defendant has given incriminating evidence at a suppression hearing, the evidence is not allowed to come into evidence at the trial. We are not persuaded by appellee's argument that extending the reasoning in *Brown v. United States*, 411 U.S. 223 (1973) would cause the appellant to lose standing in this case. Appellant's standing is

not based on a reasonable expectation of privacy to the contents of Ms. Cox's purse. The expectation of privacy goes to the issue of whether the evidence should be suppressed after standing is determined. Appellant did have standing to protest the search of Ms. Cox's purse.

Both appellant and appellee have placed reliance upon the phrase, "reasonable expectation of privacy," which was first used in the case of *Katz v. United States*, 389 U.S. 347 (1967). Whenever a reasonable expectation of privacy exists, the government, before proceeding, must either produce a warrant or there must be exigent circumstances to justify proceeding without a warrant. Although the appellant said at the second suppression hearing that he did not feel that the drugs he had placed in Ms. Cox's purse were free from governmental intrusion, we do not base our opinion thereon.

The *Katz, id.*, decision has its greatest impact on constitutional law before the zone of privacy is pierced. Here the police entered the rooming house pursuant to a valid arrest warrant. They smelled marijuana and saw seeds on a mantel. The police have pierced the zone of privacy lawfully, and there is no argument that can be properly founded on *Katz, supra*. The officers had a legal right to be in the rooming house; their discovery was inadvertent in that they did not have probable cause to believe they would see and smell marijuana upon their entry; the fact that marijuana was present was immediately apparent to the officers; there were exigent circumstances that would have authorized an immediate arrest of those sitting in the room since a misdemeanor was committed in the officers' presence (although this was not done). Appellant's reliance upon the reference in *Henry v. United States*, 361 U.S. 98 (1959) to *Johnson v. United States*, 333 U.S. 10 (1948) is not persuasive in that the arrest and search warrant in the case at bar were not based merely on the smell of marijuana coming from a *closed* room (emphasis added). Appellant's reliance upon *Johnson v. Commonwealth*, Ky. 443 S.W.2d 20 (1968) and K.R.S. 431.005 is not well founded factually. Since the officers smelled marijuana immediately after entry, a misdemeanor was committed in their presence since such smell would be probable cause to warrant a prudent man to believe that an offense had been committed. The smell of contraband is a sufficient basis for a police officer to believe that a crime is being committed in his presence. See *United States v. Bowman*, 487 F.2d 1229 (10th

Cir. 1973); *United States v. McCormick*, 468 F.2d 68 (10th Cir. 1972); *United States v. Compos*, 471 F.2d 296 (9th Cir. 1972); *People v. Chestnut*, 351 N.Y.S.2d 26 (1974); *People v. Loe*, 306 N.E.2d 368 (Ill. 1974); *State v. Elliott*, 499 P.2d 342 (Or. 1972). Also, in *Johnson v. United States*, *supra*, The Supreme Court at least implicitly recognized that the detection of the odor of contraband, coupled with other circumstances noted here, could provide adequate grounds for either the issuance of a warrant or immediate arrest.

In any event, detention of those within the rooming house was proper. If a formal arrest is not made until after a search, the search will be upheld so long as there is probable cause for an arrest before the search is begun. See *Bailey v. United States*, 389 F.2d 305 (D.C. Cir. 1972); *United States v. Gorman*, 355 F.2d 151 (2nd Cir. 1965); and *United States v. Brown*, 463 F.2d 949 (D.C. Cir. 1972).

We are in agreement with appellant's general proposition that a search warrant for premises does not authorize the search of all persons located on the premises. Normally a warrant to search premises provides no basis for the search of people who just happen to be there are are not connected in any way with the premises being searched. See *United States v. Di Re*, 332 U.S. 581 (1948). *State v. Bradbury*, 243 A.2d 302 (N.H. 1960), relying upon dictum in *Di Re*, *supra*, held that a search warrant for narcotics in the dormitory room of a female university student did not provide a basis for the search of a male who was seated in her room. These cases, however, are distinguishable from the case at bar. First, the officers in the case at bar were in a place where they had a right to be and inadvertently smelled marijuana smoke and saw marijuana seeds in plain view. Second, the purse that was searched was not worn by Ms. Cox and did not constitute a search of her person.

United States v. Johnson, 475 F.2d 977 (D.C. Cir. 1972) involved similar issues to the case at bar. There police had obtained a warrant authorizing a search for narcotics of the entire apartment of one James L. Stewart. After entry was obtained, some officers went to the living room where Ms. Johnson was found sitting on the couch. A purse, which was on the coffee table in front of the couch, was immediately searched and narcotics were found. Ms. Johnson was a visitor on the premises. In holding that this evidence should not have been suppressed, the Court said at page 978–9:

> The prohibition of the Fourth Amendment is against "unreasonable" searches and seizures. In determining whether under the circumstances of this case the search of appellee's purse violated that standard, the protection of individual privacy embodied in the Fourth Amendment must be weighed against the public interest in effective law enforcement with respect to narcotics violations. The specific question for resolution is whether the scope of the search warrant embraced an object in the apparent possession of a person not an occupant of the premises searched. Although the District Court did not expressly consider this issue, its suppression of the evidence contained the implicit holding that appellee's purse fell without the warrant.
>
> Turning first to the privacy element of the question, we note that the search was of a purse resting separately from the person of its owner. As such, it was not being "worn" by appellee and thus did not constitute an extension of her person so as to make the search one of her *person*. *United States v. Teller*, 397 F.2d 494 (7th Cir. 1968); *United States v. Riccitelli*, 259 F. Supp. 665 (D. Conn. 1966).

The *Johnson*, *supra*, opinion stated that the police could reasonably have believed that items sought and described in the warrant had been concealed in the purse and notwithstanding appellee's status as a visitor, they could have searched the purse in pursuit of items for which the warrant was issued. The reasoning in *Johnson*, *supra*, has been followed in *Commonwealth v. Show*, 298 N.E.2d 804 (Mass. 1973) *State v. White*, 538 P.2d 860 (Wash. 1975); and *People v. Colombo*, 244 N.W.2d 3 (Mich. 1976).

There is an exception in drug cases to the general principles in *Di Re*, *supra*, and *Bradbury*, *supra*. When drugs are involved, all people present can be searched because drugs can be passed easily, allowing easy concealment of evidence. "The execution of search warrants in narcotics cases is a risky business at best, and unless the police search all persons present on the premises they endanger both themselves and the search they are making." *People v. Pugh*, 217 N.E.2d 557 (Ill. 1966). We note in passing that under the rationale in *Pugh*, *id.*, those who come in during a search should only be subjected to a pat down. See also *United States v. Branch*, 545 F.2d 177 (D.C. Cir. 1976).

Appellant further contends that the $4,500 found on his person should have been suppressed. At the time appellant was subjected to a pat down, a gun with live shells had

been observed, 1,800 tablets of LSD and 215 tablets of other drugs had been found in the purse that was beside him, and a knife in a sheath had been noticed at his side. *Terry v. Ohio*, 392 U.S. 1 (1960) set forth the basic law as to when it is proper to stop and frisk. The 4th Amendment applies to a stop and frisk situation because there is an invasion of privacy. But only the "reasonableness" language of the 4th Amendment is looked to when a stop and frisk is conducted. The need to stop and frisk is balanced against the invasion of privacy that the frisk entails. Here the officers, given the facts known to them at that time, had a "reasonable" suspicion that appellant was armed. Before appellant's pat down there had been an inquiry period and the frisk that was conducted was limited in scope. The appellant was carrying 161 different bills which were approximately ¾ of an inch thick and were wrapped up with a rubber band. This bulge gave the police probable cause to go into appellant's pocket. This money, along with the drugs that were found and Ms. Cox's statement to appellant (that he should take what was his) certainly gave probable cause to arrest appellant.

"We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the federal constitution, be deemed harmless, not requiring the automatic reversal of the conviction." *Chapman v. California*, 386 U.S. 18 (1967). Here appellant's conviction rested upon a quantum of untainted evidence even if the money had been suppressed. Therefore, any error was harmless beyond a reasonable doubt since possession of over 2,000 tablets of various controlled substances diminishes the supposition that the drugs were intended for personal use only and would sustain this conviction. *Harrington v. California* 395 U.S. 250 (1969) and *Milton v. Wainwright*, 407 U.S. 371 (1972).

The judgment of conviction is affirmed.

ALL CONCUR.

ATTORNEYS FOR APPELLANT:

Kelly Thompson
P. O. Box 1927
Bowling Green, Ky 42101

Ron Parry
Suite 404, Lawyers' Bldg.
Newport, Ky 41071

ATTORNEYS FOR APPELLEE:

Robert F. Stephens
Attorney General
Capitol Bldg
Frankfort, Ky 40601

Victor Fox
Assistant Attorney General
Capitol Building
Frankfort, Ky 40601

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. CA-1185-MR

COMMONWEALTH OF KENTUCKY

Appellee

DAVID RAWLINGS

Appellant

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE J. DAVID FRANCIS, JUDGE

ACTION NOS. 17107, 17108, 17109, 17110 & 17137

ORDER DENYING PETITION FOR REHEARING

BEFORE: HOWERTON, LESTER and REYNOLDS, Judges.

The Court having considered the Petition for Rehearing and being sufficiently advised, it is ORDERED that the same is hereby DENIED. The Dissent of Lester, J., as attached, is hereby appended to the opinion of this Court rendered February 17, 1978.

JUDGE, COURT OF APPEALS

ENTERED: *June 9, 1978*

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. CA-1185-MR

COMMONWEALTH OF KENTUCKY

Appellee

v.

DAVID RAWLINGS

Appellant

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE J. DAVID FRANCIS, JUDGE
ACTION NOS. 17107, 17108, 17109, 17110 & 17137

DISSENTING OPINION

BEFORE: HOWERTON, REYNOLDS, and LESTER, Judges.

LESTER, JUDGE, DISSENTING. Even though my colleagues have reviewed the facts, I believe it necessary to repeat some of those in order to support my reasons for dissenting.

In the middle of the afternoon of October 18, 1976, some six police officers, members of both the Kentucky State Police and a local law enforcement agency, armed with a warrant of *arrest*, went to a home in Bowling Green, Kentucky, for the purposes of taking into custody a resident of that building, namely, Lawrence Marquees. Upon arrival at the home, the officers found it necessary to enter the premises forcefully and upon gaining entrance, they found five individuals situated therein, including the appellant, and one of the residents of the house, but not Marquees. The police claimed they detected the odor of marijuana. Their discovery of this alleged pungency is described by a Commonwealth witness in the following language:

> And then one of them said, 'I think I smell pot; don't you?' And the other one said, 'Yeah, I believe I do. Let's get a warrant.'
> And then?
> And so then we were all detained there until they got back with the search warrant.

Upon their arrival, the officers found no marijuana, no residue thereof, no attendant paraphernalia and saw no one in possession or using the drug. As a matter of fact, the evidence for the Commonwealth is uncontradicted that on the day in question, there was no use of marijuana on the premises.

The officers proceeded to walk through the several rooms and in a bedroom, across a hallway from the living room, they saw a shotgun and marijuana seeds. At this juncture, the five people who were present were corralled into the living room and the officer in charge of the group concluded that it would be necessary for him to travel to the courthouse to obtain a search warrant for the *premises*. Upon leaving and going to a point of approximately two blocks from the house, Detective Railey observed Marquees and effected an arrest before reaching the Commonwealth's attorney's office.

With the departure of the officer seeking the warrant, one of the remaining five or six enforcement agents told the people present in the living room that they could not leave the premises unless they subjected themselves to a search. This restraint was so absolute that when one of the detainees requested to go to an adjoining room to get a drink of water, he was not allowed to do so. Although the Commonwealth maintains that no one was arrested until after Detective Railey returned with the search warrant for the *premises*, the law is to the effect that at such time as the police told those present that they could not leave the house until they permitted a search of their persons, they were, in fact, under arrest. Our opinion in this appeal completely overlooks the language of *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 903, 88 S. Ct. 1868 (1968) to the effect:

> Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he conducted a "search." There is some suggestion in the use of such terms as "stop" and "frisk" that such police conduct is outside the purview of the Fourth Amendment because neither action rises to the level of a "search" or "seizure" within the meaning of the Constitution. We emphatically reject this notion. It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime—"arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person.

See also *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694 1707 86 S. Ct. 1602 (1966) where the Court employed the phrase "or otherwise deprived of his freedom of action in any significant way."

It is clear to me, under the foregoing authority, that when appellant was advised that he could leave the premises only after being subjected to a search that he was significantly deprived of his freedom of action and thus under arrest.

Having concluded that Rawlings was in custody, I now turn to the question of whether there was probable cause for the officers to seize his person.

It requires no citation of authority to note that an officer may arrest an individual when that person commits a misdemeanor in the policeman's presence. The law enforcement agent must *observe* the offense but more importantly, he must also observe the actor so engaged in the illegal activity. In the case before us, absolutely no one was seen doing anything and no one witness so testified. Without so concluding, if the odor of marijuana were sufficient to say someone was in possession thereof, then, on October 18, 1976, who had it? The answer is that at the time of the arrest, no one did and the police so admit.

The blatant omission in the Commonwealth's case is that if they considered a misdemeanor being committed in their presence, then who was committing the misdemeanor? This remains unanswered. It can hardly be said that there is an offense in this jurisdiction of possession of an odor and if possession of an odor is an offense, then who was in possession thereof? We believe that even though not a member of the legal profession, Officer Railey, who led this raid, most succinctly put it in the following questions and answers:

Q If you smelt (sic) marijuana in the air, would you expect that to be evidence of a misdemeanor or felony?

A It appeared to be a misdemeanor at that time.

MR. CAUDILL: Judge, he wouldn't know that.

A I wouldn't know that because that smoke in the air is not a violation at all. I'd have to refer where it came from or something.

My brothers reject the principles announced in *Johnson v. United States*, 333 U.S. 10, 92 L. Ed. 436, 68 S. Ct. 367

(1948) stating that the opinion "is not persuasive in that arrest and search warrant in the case were not based merely on the smell of marijuana coming from a *closed* room." I find the implied comparison between a closed room and an open one to be a distinction without a difference. As I view it, *Johnson*, *supra*, stands for the proposition that the smell of contraband, standing alone, will be insufficient for a warrantless search but will form a basis for presentation to a magistrate upon application for a search warrant. If an odor is improper cause for a warrantless search, then, a fortiori, it cannot serve as a foundation for arrest of a person. The observation of several needs in a nearby bedroom of the occupant of a house is not an exigent circumstance to add to smell to authorize this violation of appellant's Fourth Amendment rights. Since there is no limitation upon the rule announced in our opinion in this case, then it would be possible to place everyone in Rupp Arena under arrest in the event some few of them were smoking the drug and officers observed seeds lying about. On the other hand, it would be virtually impossible to promulgate guidelines to limit our opinion for shall we say an open room or a closed room, one person or a hundred people, one type of drug odor and not another?

Johnson, *supra*, as well as many other opinions, stand for the rule that the search may not justify the arrest while *Henry v. United States*, 361 U.S. 98, 4 L. Ed. 2d 134, 80 S. Ct. 168 (1959) dictates that before police can restrict one's liberty—which is an arrest—there must be probable cause for so arresting. If there are reasonable grounds to believe that the detainee has committed a felony, the seizure of his person is proper as is the arrest of one who commits a misdemeanor in the presence of an officer. In the case at bar, the Commonwealth contends that a misdemeanor had been committed in the presence of Railey and his compatriots but for reasons hereinabove set forth, I disagree with that premise. The majority would circumvent the mandates of *Johnson* and *Henry* because in addition to the smell, they observed a few seeds in the householder's (who was not present) bedroom which was separate and apart from the room where appellant was situated. The second circumstance which my brothers rely up to distinguish this cause from the cited cases, is that drugs were later found in one of the arrestee's purse but those were the fruits of an illegal arrest and thus an illegal search.

The opinion herein seeks to avoid *United States v. Di Re*,

332 U.S. 581, 92 L. Ed. 210, 68 S. Ct. 222 (1947) (which stands for the proposition that a search warrant for premises does not authorize the search of all persons located thereon) for the same reasons applied to *Johnson* and *Henry* in spite of the fact that the majority agree with *Di Re*. I see no valid distinguishing factors between the case at bar and *Di Re*.

It cannot be argued that the police had probable cause to arrest Rawlings and his friends upon the grounds of preserving evidence for at the time, they were unaware of any evidence that had to be preserved. Prior to entering the quarters, not one police official had ever known of or had seen any of the parties they seized and it can hardly be said that they had any reason to believe that they were in possession of drugs. The most that the detainees could be said to be in possession of is some vapors which the evidence revealed they did not create.

Even though I do not believe that this case goes any further than the illegal arrest which was effected soon after the officers entered the dwelling, I believe some brief comment should be made concerning the search of the woman's purse and the person of appellant.

After all witnesses for both sides of this litigation agreed to the congenial atmosphere existing during the forty-five minute interval while Railey apprehended Marquees and obtained the search warrant, there is an almost unbelievable change at such time as the detective returned. The unconvincing testimony of the police is to the effect that once the search warrant was read that they all experienced fear for their safety eminating from what is now three detainees (as compared to five or six armed men) to such an extent that it became necessary to go beyond the "pat down" search as described in *Terry*, *supra*, (but not authorized by that case in circumstances such as this) and conduct the in depth or inside the outer clothing search. This was done in spite of the fact that the officer examining appellant testified that after the pat down, he knew Rawlings had no gun where a bulge appeared to be under his arm. It is incredulous that the policeman experienced the sudden fear they claimed they did after joining with Rawlings and his friends for better than a half hour in listening to phonograph records.

Insofar as the opinion authorized the search of a woman's purse laying on a couch immediately next to her person pursuant to a search warrant for the premises, I can only

add that I am unwilling to extend to this jurisidiction the rule as enunciated by the Court of Appeals for the District of Columbia, Massachusetts, Michigan and Washington. In the first place, Kentucky is not bound by those decisions and in the second place, under our opinion in this appeal, it would be necessary for every woman to clutch to her person that very integral part of her apparel in order to avoid a search of it when illegally detained.

The opinion in this cause concludes that some constitutional errors are so unimportant and unsignificant as to be deemed harmless citing *Chapman v. California*, 386 U.S. 17, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). I should first point out that the Court reversed the conviction of Chapman for violation of her constitutional rights. I, for one, am unwilling to participate in the denial of a litigant's Fourth Amendment rights such as are delineated in *Terry, supra*, and was so done in this case on the grounds that the error was insignificant and unimportant. I would rather subscribe to the principle of *Henry, supra*, in that

> It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than the citizens be subject to easy arrest.

For the reasons stated herein, I dissent.

ATTORNEYS FOR APPELLANT:

Kelly Thompson
P.O. Box 1927
Bowling Green, Kentucky 42101

Ron Parry
Suite 404, Lawyers' Building
Newport, Kentucky 41071

ATTORNEYS FOR APPELLEE:

Robert F. Stephens
Attorney General
Victor Fox
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

SUPREME COURT OF KENTUCKY
78-SC-324-D
(CA-1185-MR)

COMMONWEALTH OF KENTUCKY
Respondent

V.

DAVID RAWLINGS
Movant

WARREN CIRCUIT COURT
17137

ORDER GRANTING DISCRETIONARY REVIEW

The motion of David Rawlings for a review of the decision of the Court of Appeals is granted.

The clerk of the Court of Appeals is directed to transfer to the clerk of the Supreme Court the entire record in this proceeding, File No. CA-1185-MR.

Entered November 14, 1978.

Chief Justice

SUPREME COURT OF KENTUCKY
78-SC-324-DG

COMMONWEALTH OF KENTUCKY

Respondent

V.

DAVID RAWLINGS

Movant

ON REVIEW FROM COURT OF APPEALS
CA-1185-MR
(Warrent Circuit Court No. 17134)

OPINION OF THE COURT BY
JUSTICE STEPHENSON

Affirming

David Rawlings was convicted of the possession of controlled substances for the purpose of sale, KRS 218A.990, and sentenced to a term of five years' imprisonment in the penitentiary. The Court of Appeals affirmed. We granted discretionary review and affirm.

Police officers with a warrant for the arrest of a Lawrence Marquess forcibly entered his residence. Five individuals, including the movant David Rawlings, were found in the living room of the residence. During the course of the search of the residence for Marquess, the officers noted the odor of marijuana and in another room observed marijuana seeds on a mantel. The officers then determined that a search warrant was indicated, and one or two of the officers left to procure a search warrant. During the period of forty-five minutes wait for the two officers to obtain the search warrant, the five individuals, including Rawlings, were detained in the living room and were informed by the officers that they could not leave the room unless they consented to a search of their person; two of the individuals were permitted to leave after submitting to a search. After the indicated lapes of time, the officers returned with a search warrant, authorizing a search of the premises. There was no authority for the search of individuals on the premises.

One of the individuals remaining in the living room, a Vanessa Cox, was seated on a couch with her purse lying on the couch between her and Rawlings. The officers ordered Vanessa Cox to stand and empty her purse on the table. The purse was emptied of a large amount of controlled substances, and Vanessa Cox informed the officers that the drugs belonged to Rawlings. Rawlings admitted to the officers that he was the owner of the drugs. Rawlings, prior to the arrival of the police officers, had placed the drugs in the purse belonging to Vanessa Cox.

From our review of the record, when the officers returned with the search warrant for the premises, they decided to search all the individuals. While the purse belonging to Vanessa Cox was being emptied, Rawlings was asked to stand. Then came the admission as to being the owner of the drugs. Thereupon Rawlings' person was searched. The search yielded a wad of bills, in the amount of $4,500, and a knife in a sheath. Rawlings was then placed under arrest. The exact sequence of events here is not clear from the record.

At a pretrial suppression hearing, the trial court ruled that the drugs and money were admissible into evidence. During the course of the trial, both the drugs and the money were the subject of testimony and both were introduced as exhibits.

The concept of "standing," to raise a Fourth Amendment violation argument with respect to the drugs in the purse, occupies a great deal of the argument by both Rawlings and the Commonwealth. The trial court determined that Rawlings did not have "standing." The Court of Appeals, after a lengthy analysis of case law, determined that Rawlings did have "standing" but decided that the search of the purse was not invalid and affirmed the judgment of the trial court.

The central issue in this case is the warrantless search of Vanessa Cox's purse. In resolving this issue, we are confronted with the proposition of "standing" on the part of Rawlings to raise the Fourth Amendment issue and the ulimate issue—the merits of the Fourth Amendment argument. "Standing" is a largely theoretical concept. Learned texts on the subject abound. The United States Supreme Court has written many times and at length on the subject. It is almost impossible to separate the concept of "standing" and the principles of law on the merits. The concept of "standing" is theoretically separate from a defendant's

rights under the Fourth Amendment but is so interwoven that discussion of one overlaps the other. All in all we confess that we find the concept of "standing" totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally incapable of understanding. So in approaching the central issue in this case, we prefer to speak in terms of substantive right under the Fourth Amendment. We have considered Rakas v, Illinois, ___ U.S. ___, 99 S.Ct. 421, 58 L.Ed2d 387 (1978); Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed2d 1247 (1968); Jones v. United States, 362 U.S. 257, 80 S. Ct. 725, 4 L.Ed2d 697 (1960); U.S. v. Johnson, 475 F .2d 977 (DC Cir. 1972); and Sumrall v. United States, 382 F .2d 651 (10th Cir. 1967). We are of the opinion the evidence obtained by the search of Vanessa Cox's purse was properly admitted at trial. We feel that Rawlings probably does not have standing to raise the issue here. Jones apparently would confer standing on the theory that possession of the drugs both convicts and confers standing since the offense here is possession, admitting ownership is admitting guilt. Here the defendant did not find himself in that dilemma, he admitted ownership of the drugs when they appeared from the purse and Vanessa Cox stated the drugs belonged to him. Further, *Simmons* established that evidence to show standing is not admissible, over objection, on the issue of guilt. We are not sure of the effect of *Rakas* although it seems to reject the theory of *Jones* on "standing." We are of the opinion that the search of Vanessa Cox's purse did not violate Rawlings' legitimate or reasonable expectation of freedom from governmental intrusion.

For what it is worth, Rawlings testified at the suppression hearing that when he placed the drugs in Vanessa Cox's purse, he did not expect or feel that the purse would be free from the intrusion of the officers. There is the factor of the risk that Vanessa Cox might consent to a search of her purse together with the always present possibility of inadvertent exposure of the drugs. Considering the totality of the circumstances, we are of the opinion the search did not violate Rawlings' legitimate or reasonable expectations of freedom from governmental intrusion into the purse and that Rawlings has not made a sufficient showing that his legitimate or reasonable expectations of privacy were violated.

The money found on Rawlings' person was admitted into evidence at trial, the knife was not. This search was not

explored in detail at the suppression hearing, other than a denial of the motion to suppress. This issue does not involve such complicated principles as the search of the purse, and we prefer to validate this search on the theory of a search incident to a valid arrest. In arriving at this conclusion, we disregard as irrelevant the detention during the period in which the officers were procuring a search warrant. As we have said, the sequence of the search of the purse and Rawlings' admission of ownership of the drugs is not clearly established in the record. Clearly, after Rawlings admitted ownership of the drugs, the officers were entitled to arrest and search the person, or search and then arrest. Cupp v. Murphy, 412 U.S. 291, 93 S.Ct. 2000, 36 L.Ed2d 900 (1973).

The opinion of the Court of Appeals is affirmed.

All concur except Lukowsky, J., who dissents.

ATTORNEYS FOR MOVANT:

Ronald R. Parry
Harry P. Hellings
Jolly, Johnson, Blau & Parry
30 W. Fourth Street
P.O. Box 368
Newport, Kentucky 41072

ATTORNEYS FOR RESPONDENT:

Robert F. Stephens
Attorney General

Victor Fox
Assistant Attorney General
New State Capitol
Frankfort, Kentucky 40601

Kelly Thompson, Jr.
410 East 11th Street
P.O. Box 275
Bowling Green, Kentucky 42101

SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY

Respondent

v.

DAVID RAWLINGS

Movant

ON REVIEW FROM COURT OF APPEALS
CA-1185-MR
(Warren Circuit Court No. 17134)

DISSENTING OPINION BY JUSTICE LUKOWSKY

The majority opinion holds that the search of Cox's purse did not violate "Rawlings' legimiate or reasonable expectation of freedom from governmental intrustion" under the Fourth Amendment even though the items seized belonged to Rawlings and had been placed in Cox's purse with her consent for safekeeping.[1] I am compelled to dissent for two reasons.

I

The searches and seizures which occurred were the fruits of unlawful arrests and should be suppressed. Wong Sun v. United States, 371 U.S. 481, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). After lawfully entering the premises to arrest Marquees the police officers decided that they had probable cause to obtain a warrant to search the premises for marijuana. While some of the police officers went to obtain the search warrant, the remaining police officers would not allow those present to leave the room or the premises unless they would submit to a search. This constituted an ar-

[1] Although not articulated in the majority opinion it must be assumed from its tenor that if Cox had been challenging the validity of the search instead of Rawlings the court would have held the search to the unreasonable under the Fourth Amendment and ordered the evidence suppressed. United States v. Micheli, C.A. 1st, 487 F. 2d 429 (1973); United States v. Hooper, E.D. Tenn., 320 F. Supp. 507 (1969); Parker v. State, 177 Tenn. 380, 150 S.W. 2d 725 (1941).

rest because it significantly deprived those individuals of their freedom of action. Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). It was not an investigatory stop but an arrest because the detention here went well beyond the bounds of permissible investigatory stops. See, e.g., United States v. McCaleb, 6th C.A., 552 F .2d 717, 720 (1977); Manning v. Jarrigan, 6th C.A., 501 F .2d 408, 410-411 (1974).

The arrest of Rawlings and the other people present at 1264 Adams Street was unlawful because no misdemeanor had been committed in the presence of the police officers.[2] KRS 431.005. The facts that the police officers smelled the odor of burnt marijuana and inadvertently discovered a few marijuana seeds in "plain view" in Marquess' room created probable cause for the police officers to obtain a search warrant for the premises, but did not establish that a misdemeanor was being committed in their presence by any of the individuals on the premises.[3] See, e.g., Marsh v. Commonwealth, 255 Ky. 484, 74 S.W. 2d 943 (1934). The odor of burnt marijuana is merely evidence that marijuana has been smoked on the premises at sometime in the past.[4] It does not establish that marijuana is present on the premises at the time the odor is detected. Only the odor of either unburned marijuana or burning marijuana would indicate the actual presence of marijuana on the premises. The presence of the seeds in Marquess' room did not create probable cause to believe that any of the individuals in the living room possessed marijuana even with the presence of the odor of burnt marijuana. See, e.g., People v. Hilker, 403 Mich. 312, 269 N.W. 2d 159 (1978); State v. Schoendaller, Mont., 578 P. 2d 730, (1978). The possession of the odor of burnt marijuana is not an offense in this Commonwealth hence no misdemeanor was committed in the presence of the police officers.

[2] The first offense of possession of marijuana for sale is a misdemeanor. KRS 218A.990 (4). There is nothing in the record to indicate that any of the individuals present had been previously convicted of this offense so as to provide the police officers with reasonable grounds to believe a felony had been committed by anyone.

[3] The possesion of marijuana for personal use is a misdemeanor. KRS 218A. 990(7).

[4] The Commonwealth's evidence established that it had been at least twenty-four hours since marijuana had been smoked on the premises.

But for the unlawful detention of Rawlings and the others present in the house, the police would not have discovered any evidence against Rawlings. All evidence discovered was a result of this unlawful detention and should be suppressed as "fruit of the poisonous tree." Wong Sun v. United States, supra; Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975).

II

Even if Rawlings and the others present had not been arrested by the police when they detained them for forty-five minutes, the search of Cox's purse was unlawful because the search was beyond the perimeter of the search warrant and consequently unreasonable under the Fourth Amendment.[5] The real issue here is whether Rawlings should be permitted to raise the clear violation of Cox's Fourth Amendment rights as a violation of his own on the basis that he owned the property seized and the offense charged is the possession of that property.[6]

The majority opinion concludes "that Rawlings *probably* does not have standing to raise the issue . . ." of the illegality of the search of Cox's purse. (Emphasis added). This conclusion is apparently based on Rakas v. Illinois ___U.S.___, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978).

Rakas is substantially different from the instant case. It involved a non-possessory offense and the articles seized were not owned by or in the possession of the defendants. Id. ___U.S. at___n.1, 99 S. Ct. at 423 n.1, 58 L. Ed. 2d at 393 n.1. Rakas reformulated the test for standing to contest the legality of a search. It held that standing and the substantive Fourth Amendment question of whether a reasonable expectation of privacy exists are the same. That is to say, if there is standing there is a legitimate expectation of privacy and vice versa. However, it left undisturbed the automatic standing rule articulated in Jones v. United

[5] Supra note 1.

[6] Because of the limitations imposed on federal review of Fourth Amendment issues by Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), I am disturbed that my colleagues are willing to affirm a conviction which rests upon allegedly illegally obtained evidence when they confess in the majority opinion that they find the concepts of law involved to be "totally incomprehensible." Collins v. Commonwealth, Ky., 574 S.W. 2d 296, 298 n.1 (1978) Lukowsky, J., dissenting).

States, 362 U.S. 257, 80 S. Ct. 725, 4 L. Ed. 2d 697 (1960), for possessory offenses. I do not read Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968), as undermining this rule but as a reaffirmation of it.[7] Rakas v. Illinois,___U.S.___,___ n.6, 99 S. Ct. 421, 439 n.6, 58 L. Ed. 2d 387, 412 n.6 (1978) (White, J., dissenting); See Brown v. United States, 411 U.S. 223, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973).

Rawlings is charged with a possessory offense and the Commonwealth should not be heard to say that his possessoin of these drugs is sufficient to support his conviction but insufficient to support a reasonable expectation of privacy when they are concealed in the purse of a companion. He was entitled to expect that governmental officials would intrude into the purse only with consent or by complying with the Fourth Amendment. Rakas v. Illinois,___U.S.___,___, 99 S. Ct. 421, 441, 58 L. Ed. 2d 387, 414 (1978) (White, J., dissenting). Jones v. United States, supra, recognizes his standing to raise the illegality of the search and seizure of the evidence from Cox's purse. Rakas v. Illinois,___U.S.___,___n.4, 99 S. Ct. 421, 426 n.4, 58 L. Ed. 2d 387, 396 n.4 (1978). Because the search of Cox's purse was an unreasonable search and seizure it should be suppressed. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

Further, the search of Rawlings' person was unlawful because it was not incident to a valid arrest. The "second" arrest upon which the search was based was itself unlawful because it was based upon the fruits of the illegal search for and seizure of the drugs in Cox's purse.

I would reverse the judgment and remand the case to the circuit court for a new trial with directions to suppress the evidence discovered by the unlawful searches.

[7] Simmons v. United States holds that when possession of the seized evidence is in itself an essential element of the offense with which the defendant is charged the prosecution is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence.

SUPREME COURT OF KENTUCKY
78-SC-324-DG
May 1, 1979

COMMONWEATH OF KENTUCKY

vs.

DAVID RAWLINGS

WARREN CIRCUIT COURT
17137

The Court being sufficiently advised, and this Court's opinion having been rendered May 1, 1979, it is therefore considered that the decision of the Court of Appeals is affirmed, which is ordered to be certified to said court.

MARTHA LAYNE COLLINS, CLERK

Issued May 22, 1979

In The Supreme Court of the United States

No. 79-5146

DAVID RAWLINGS,

Petitioner,

v.

Kentucky

ON PETITION FOR WRIT OF CERTIORARI TO the Supreme Court of the Commonwealth of Kentucky.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is set for oral argument in tandem with No. 79-244, *United States* v. *Salvucci.*

December 10, 1979

RECEIVED
SEP 24 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-5146

DAVID RAWLINGS — PETITIONER

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

ORIGINAL COPY

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT IN OPPOSITION

ROBERT F. STEPHENS
ATTORNEY GENERAL

VICTOR FOX
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

IN THE

SUPREME COURT OF THE UNITED STATES

No. 79-5146

DAVID RAWLINGS — PETITIONER

V.

COMMONWEALTH OF KENTUCKY — RESPONDENT

BRIEF FOR RESPONDENT IN OPPOSITION

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(3).

Question Presented

I. THE DECISION BELOW WAS BASED ON GROUNDS OTHER THAN THOSE ALLEGED IN THE PETITION AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Statement of the Case

Petitioner's statement of the case is substantially correct. Additional material facts and corrections will be set out in the argument which follows.

Argument

I. THE DECISION BELOW WAS BASED ON GROUNDS OTHER THAN THOSE ALLEGED IN THE PETITION AND DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

Petitioner Rawlings alleges the court below decided that he lacked standing. Because "the decision below holding that petitioner lacked standing ... conflicts with previous decisions ..." he urges this Court grant his petition.

While the decision below did discuss "automatic standing" vis-a-vis Rakas v. Illinois, 439 U.S. 128 (1978) and Jones v. United States, 362 U.S. 257 (1960), it is manifestly clear from the decision that it was decided "in terms of substantive right under the Fourth Amendment." 581 S.W.2d at 349. The Court, while it felt that Rawlings probably did not have standing, went on and decided his claim without regard to his standing. The Court stated "that the search of Vanessa Cox's purse did not violate Rawlings' legitimate or reasonable expectation of freedom from governmental intrusion." 581 S.W.2d at 350. The issue of standing was therefore not decided below and Mr. Rawlings is precluded from doing so now. Cardinal v. Louisiana, 394 U.S. 437 at 438.

Conclusion

The decision below is based on grounds other than those alleged in the petition. It is manifest that the petition does not present a substantial federal question and certiorari should be denied.

Respectfully submitted,

ROBERT F. STEPHENS
ATTORNEY GENERAL

VICTOR FOX
ASSISTANT ATTORNEY GENERAL
Capitol Building
Frankfort, Kentucky 40601

COUNSEL FOR RESPONDENT

Supreme Court, U. S.
FILED
FEB 6 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5146

DAVID RAWLINGS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR PETITIONER

J. VINCENT APRILE II
Assistant Deputy Public Advocate
Office for Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Attorney for Petitioner

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

INDEX

Page

TABLE OF AUTHORITIES ..... (iii)
OPINIONS BELOW 1
JURISDICTION 1
QUESTIONS PRESENTED 2
CONSTITUTIONAL PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
SUMMARY OF ARGUMENT 13
ARGUMENT:
I. Petitioner has standing to raise a clear violation of Vanessa Cox's Fourth Amendment rights as a violation of his own constitutional rights on the basis that he owned the property seized and the offense charged is the unlawful possession of that property 22
A. Petitioner was entitled to automatic standing to contest the search of Vanessa Cox's purse because he was charged with offenses that included, as an essential element of each offense charged, possession of the seized evidence at the time of the contested search and seizure 28
B. Petitioner was entitled to actual standing to contest the search of Vanessa Cox's purse because he claimed ownership of the seized property 46
C. Petitioner was entitled to contest the search of Vanessa Cox's purse because that search violated his reasonable expectation of privacy 58

IV. The search of petitioner's person, ostensibly conducted incident to a valid arrest, violated the Fourth and Fourteenth Amendments since probable cause for the arrest was predicated on the fruits of a prior illegal search and seizure of contraband drugs 62

III. The Fourth and Fourteenth Amendments were violated by the search of Vanessa Cox's purse and the seizure of its contents when that search was conducted pursuant to a warrant which authorized only a search of the premises of the residence in which she was a visitor 74

IV. The search of petitioner's person, ostensibl conducted incident to a valid arrest, violated the Fourth and Fourteenth Amendments since probable cause for the arrest was predicated on the fruits of a prior illegl search and seizure of contraband drugs 82

CONCLUSION 84

TABLE OF AUTHORITIES

Page

Cases:

Adams v. Williams, 407 U.S. 143 (1972) 66

Agnello v. United States, 269 U.S. 20 (1925) 33

Alderman v. United States, 394 U.S. 165 (1969) 22,49

Brinegar v. United States, 338 U.S. 160 (1949) 67

Brown v. Illinois, 422 U.S. 590 (1975) 63,66,72

Brown v. United States, 411 U.S. 223 (1973) ..... *passim*

Burns v. State, Okl. Cr., 595 P. 2d 801 (1979) 24

California v. Green, 399 U.S. 149 (1970) 35,36

Carroll v. United States, 267 U.S. 132 (1925) 67

Combs v. United States, 408 U.S. 224 (1972) 47,55

Cupp v. Murphy, 412 U.S. 291 (1973) 82

Davis v. Mississippi, 394 U.S. 721 (1969) 66,67

Delaware v. Prouse, XXX U.S. XXX
99 S. Ct. 139 (1979) 66

Dunaway v. New York, ___ U.S. ___
98 S. Ct. 2248 (1979)..... *passim*

Duncan v. State, 276 Md. 715, 351 A. 2d 144 (1976 37

Edwards v. Commonwealth, Ky., 573 S.W. 2d 640 (1978)c .. 35

Harris v. New York, 401 U.S. 222 (1971) 33,34

Jett v. Commonwealth, Ky., 436 S.W. 2d 788 (1969) 36

Johnson v. Commonwealth, Ky., 443 S.W. 2d 20 (1968) .. 68

Johnson v. United States, 333 U.S. 10 (1948) 68

Jones v. United States, 362 U.S. 257 (1960) ..... *passim*

Katz v. United States, 389 U.S. 347 (1967) 60,61

Ker v. California, 374 U.S. 23 (1963) 68

Mancusi v. DeForte, 392 U.S. 364 (1968) 25,47,60

Michigan v. Defillippo, XXX U.S. XXX,
99 S. Ct. 2627 (1979 67

Michigan v. Tyler, XXX U.S. XXX,
98 S. Ct. 1942 (1978) 57,58
Mincey v. Arizona, XXX U.S. XXX,
98 S. Ct. 2408 (1978) 57,58,74
Miranda v. Arizona, 384 U.S. 436 (1966) 34
Nardone v. United States, 308 U.S. 338 (1939) 39
New Jersey v. Porthash, XXX U.S. XXX,
99 S. Ct. 1292 (1979) 34
Pennsylvania v. Mimms, 434 U.S. 196 (1977) 66
People v. Douglas, 66 Cal. App. 3d 998,
136 Cal. Rptr. 358 (1977) 32,35
People v. Hilber, 403 Mich. 312,
269 N.W. 2d 159 (1978) 69
People v. Sturgis, 58 Ill. 2d 211,
317 N.E. 2d 545 (1974) 32
Rakas v. Illinois, 439 U.S. 128 (1978) .....*passim*
Rawlings v. Commonwealth, Ky.,
581 S.W. 2d 348 (1979) .....*passim*
Sibron v. New York, 392 U.S. 40 (1968) 70,76
Silverthorne Lumber Co. v. United States,
251 U.S. 385 (1920) 39
Simmons v. United States, 390 U.S. 377 (1968) .....*passim*
State v. Lukefahr, La., 363 So. 2d 661 (1978) 39
State v. Matthews, N.D., 216 N.W. 2d 90 (1974) 28
State v. Petrovich, 125 N.J. Super. 147,
309 A. 2d 281 (1973) 32
State v. Schoendaller, Mont. 578 P. 2d 730 (1978) 69
Terry v. Ohio, 392 U.S. 1 (1968) 11,64,65,66,78,79
United States v. Archbold-Newball, 554 F. 2d 665
(5th Cir. 1977) 50
United States v. Balsamo, 468 F. Supp. 1363
(S.D. Me. 1979) 24,25
United States v. Boston, 510 F. 2d 35
(9th Cir. 1974) 25,46

United States v. Brignoni-Ponce,
422 U.S. 873 (1975) 66
United States v. Bruneau, 594 F. 2d 1190
(8th Cir. 1979) 24
United States v. Byers, 600 F. 2d 1130
(5th Cir. 1979) 24
United States v. Ceccolini, XXX U.S. XXX,
98 S. Ct. 1054 (1978) 63,73
United States v. Cella, 568 F. 2d 1266
(9th Cir. 1977) 25
United States v. Cobb, 432 F. 2d 716
(4th Cir. 1970) 46
United States v. Galante, 547 F. 2d 733
(2nd Cir. 1976) 51,54
United States v. Guerrera, 554 F. 2d 987
(9th Cir. 1977) 25
Unites States v. Hunter, 550 F. 2d 1066
(6th Cir. 1977) 43,44,51
United States v. Jackson, 585 F. 2d 653
(4th Cir. 1978) 51
United States v. Jeffers, 342 U.S. 48 (1951) 52,54,55
United States v. Kahan, 415 U.S. 239 (1974) 33
United States v. Lisk, 522 F. 2d 228
(7th Cir. 1975) 51,52
United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 66
United States v. Mazzelli, 595 F. 2d 1157
(9th Cir. 1979) 24,48
United States v. Oates, 560 F. 2d 45
(2nd Cir. 1977) 46
United States v. Reyes, 595 F. 2d 275
(5th Cir. 1979) 46
United States v. Sacco, 436 F. 2d 780
(2nd Cir. 1971) 54

United States v. Salvucci, 599 F.2d 1094 (1st Cir. 1979) 24
United States v. Smith, 550 F. 2d 277 (5th Cir. 1977) 51
United States v. Tortorello, 533 F. 2d 809 (2nd Cir. 1976) 28
United States v. Wilson, 536 F. 2d 883 (9th Cir. 1976) 50,60
Walder v. United States, 347 U.S. 62 (1954) 33
Wong Sun v. United States, 371 U.S. 471 (1963) ....*passim*
Ybarra v. Illinois, XXX U.S. XXX, 100 S. Ct. 338 (1979) .....*passim*

Other Authorities:

Frank & Rosenthal, *Marijuana Grower's Guide* (Berkeley 1978) 69
Gutterman, "A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition, 23 Emory L. J. 111 (1974) 50
Knox, Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures, 40 Mo. L. Rev. 1 (1975) 54
3 LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* (1980) .....*passim*
Note, 64 Geo. L. J. 1187 (1976) 54
Ringel, *Searches & Seizures, Arrests and Confessions* (2nd Ed. 1979) 34
Trager and Lobenfeld, *The Law of Standing Under the Fourth Amendment,* 41 Brooklyn L. Rev. 421 (1975) 43

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No. 79-5146

DAVID RAWLINGS,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (Appendix, hereinafter designated App., pp. 76-83) is reported as *Rawlings v. Kentucky,* Ky., 581 S.W. 2d 348 (1979). The opinion of the Court of Appeals of Kentucky (App., pp. 61-67) is not reported.

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on May 1, 1979. The mandate of the Supreme Court of Kentucky was issued in petitioner's case on May 22, 1979 (App., p. 84). The petition for writ of certiorari was granted on December 10, 1979 (App., p. 85). The jurisdiction of this court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether petitioner has standing to raise a clear violation of Vanessa Cox's Fourth Amendment rights as a violation of his own constitutional rights on the basis that he owned the property seized and the offense charged is the unlawful possession of that property.

2. Whether the searches and seizures which produced the contraband drugs and other incriminating evidence were the fruits of the unconstitutional arrests of both petitioner and Vanessa Cox, in violation of the Fourth and Fourteenth Amendments of the Federal Constitution.

3. Whether the Fourth and Fourteenth Amendments were violated by the search of Vanessa Cox's purse and the seizure of its contents when that search was conducted pursuant to a warrant which authorized only a search of the premises of the residence in which she was a visitor.

4. Whether the search of petitioner's person, ostensibly conducted incident to a valid arrest, violated the Fourth and Fourteenth Amendments since probable cause for the arrest was predicated on the fruits of a prior illegal search and seizure of contraband drugs.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendent to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In the middle of the afternoon of October 18, 1976, some six police officers, members of both the Kentucky State Police and a local law enforcement agency, armed with an *arrest* warrant for Lawrence Marquess, forcibly entered his residence in Bowling Green, Kentucky (Transcript of Evidence, hereinafter designated as T.E., pp. 132-133, 151-152, 181, 196; Transcript of Suppression Hearing of November 29, 1976, hereinafter designated as T.S.H. (I), pp. 2-3; App., pp. 30-31).[1] Upon entering the premises, the police found five individuals in the living room of the Marquess residence - the petitioner David Rawlings, Vanessa Cox, Linda Braden, Keith Northern and Dennis Saddler (T.S.H. (I), p. 4; App., p. 31). During the course of the search of the residence for Marquess, the officers noted the odor of burned marijuana and in another room observed on a

[1]The police possessed a bench warrant for the arrest of Lawrence Marquess on the felony charge of trafficking in LSD (T.E., p. 132). According to police testimony, Marquess, some three or four months prior to the issuance of the arrest warrant, had at his Bowling Green residence sold a quantity of LSD to an undercover agent (T.S.H. (I), p. 3; App., p. 30; T.E., p. 179).

mantel what appeared to be marijuana seeds (T.E., pp. 133-135, 152-153, 182, 197; T.S.H. (I), pp. 3-5; App., p. 31).[2] Marquess, who was under indictment for trafficking in Schedule I controlled substances, was not found during the search of his residence.

The police officers then decided that a search warrant for the house was needed and two of the officers left to procure the warrant (T.E., pp. 136, 153, 182, 197; T.S.H. (I), p. 5; App., p. 31). During the forty-five minute wait for the two officers to secure the warrant and return to the residence, the five individuals, including petitioner, were detained in the living room and were informed by the police that they could not leave the room unless they consented to a search of their person (T.E., pp. 25-27, 38-40, 110-111, 153, 182-183, 197-198; Transcript of Suppression Hearing, December 1, 1976, hereinafter designated as T.S.H. (II), pp. 8-10; App., pp. 45-46). Two of the individuals present, Linda Braden and Keith Northern, were permitted to leave after submitting to a search (T.E., pp. 26, 40, 110, 198; T.S.H. (II), p. 10; App., p. 46).

After approximately forty-five minutes, the two police officers returned to the residence with a search warrant, authorizing a search of the premises (T.E., pp. 138-139, 154-155; T.S.H. (I), pp. 5, 14-15; App., pp. 31-32, 36-37). This search warrant did not authorize the search of individuals on the premises (T.S.H. (I), p. 19; App., p. 39; T.E., p 167).

[2]In Kentucky the possession of marijuana for personal use is a misdemeanor. Kentucky Revised Statutes (KRS) 218A.990(7) provides that "[a]ny person who knowingly and unlawfully possesses for his own use or transfers marijuana shall be confined in the county jail for not more than 90 days or be fined not more than $250." Although "[m]arijuana" is defined in KRS Chapter 218A to mean "all parts of the plant Cannabis sativa L.," including "the seeds thereof," the definition specifically excludes "the sterilized seed of the plant which is incapable of germination." KRS 218A.010(9).

Two of the three individuals remaining in the living room, Vanessa Cox and petitioner, were seated on a couch with Ms. Cox's purse placed on the couch between them (T.E., pp. 27, 45, 141; T.S.H. (I), p. 6; App., p. 32). One of the officers ordered Vanessa Cox to stand and empty her purse onto the table (T.E., pp. 144,155). When the contents were emptied from the purse, numerous vials and bottles containing controlled substances and an address book were exposed to view (T.E., pp. 13, 16-17, 19, 28, 45-46, 47, 50-51, 149, 155; T.S.H. (I), p. 8; App., p. 33). Vanessa Cox informed the police officers that the drugs and other items belonged to petitioner; at that juncture petitioner admitted that he was the owner of the drugs discovered in Ms. Cox's purse (T.E., pp. 28-29, 31, 47, 100-101, 149-150; T.S.H. (I), pp. 9, 11-12; App., pp. 34-35). petitioner, prior to the initial arrival of the police, had placed the drugs and the address book in the purse belonging to Vanessa Cox (T.E., pp. 12-15, 23-24, 35, 100; T.S.H. (I), p. 12; T.S.H. (II), pp. 3-4, 20; App., pp. 35, 42-43, 51-52).

While the purse belonging to Vanessa Cox was being emptied, petitioner was asked by the police to stand to be searched. At that point petitioner admitted ownership of the drugs found in the purse and was immediately subjected to a search of his person. The search revealed a wad of bills in the amount of $4,500 and a knife in a sheath. Petitioner was then formally placed under arrest (T.E., pp. 15-48, 145-146, 149-150, 156, 160; T.S.H. (I), pp. 9-10, 16-17; T.S.H. (II), pp. 11-13; App., pp. 33-34, 38, 46-48).

On October 27, 1976 petitioner, David Rawlings, was indicted by the Warren Circuit Court Grand Jury in Bowling Green, Kentucky on four counts of trafficking in controlled

substances classified in Schedules I, II and III in violation of Kentucky Revised Statues (KRS) 218A.990(2) (Transcript of Record, hereinafter designated T.R., pp. 1-4; App., pp. 4-7). According to the indictments, the controlled substances were LSD, Benzphetamine, Methamphamine, and Methyprylon (T.R., pp. 1-4; App., pp. 4-7). On November 1, 1976, petitioner was also indicted in the Warren Circuit Court for the offense of trafficking in a controlled substance classified in Schedule II, Pentobarbital, in violation of KRS 218A.990(2) (T.R., p. 9; App., p. 8).[3]

Petitioner on November 3, 1976 filed a pretrial motion "to suppress all evidence seized in this action because said evidence was derived from an illegal arrest . . .without probable cause by the arresting officers" (T.R., p. 14; App., p. 9). On November 15, 1976, petitioner filed a motion to suppress the evidence confiscated in the case due to the defective search warrant and the illegal arrest (T.R., p. 24; App., p. 10). On November 18, 1976 petitioner filed a motion "to suppress all evidence seized in this action pursuant to a [s]earch [w]arrant . . . in that said [s]earch [w]arrant does not specifically name any individual to be searched" (T.R., p. 44; App., p. 11).

On November 29 and December 1, 1976, evidentiary

[3]KRS 218A.990(2) provides that "[a]ny person who knowingly and unlawfully traffics in a controlled substance classified in Schedule I or II other than a narcotic drug, except marijuana, or in any controlled substance classified in Schedule III," commits a criminal offense. "Traffic" as used in KRS 218A.010(19).means to manufacture, sell, transfer or possess with intent to sell a controlled substance." KRS 218A.010(19).

Each of the five indictments alleged that petitioner did, "[o]n or about the 18 day of October A.D., 1976, . . . have in his possession, for the purpose of sale," the particular controlled substance (T.R., pp. 1-4, 9; App., pp. 4-8).

hearings were held on the defense motions to suppress. At the latter hearing, petitioner took the witness stand and asserted his ownership of the drugs which the police had discovered in Ms. Cox's purse (T.S.H. (II), pp. 3-7; App., pp. 42-44). The defense motions to suppress were overruled at the conclusion of the December evidentiary hearing (T.S.H. (II), pp. 27, 30; App., pp. 55-57).

Following the overruling of the suppression motions, petitioner sought and received the trial court's permission to waive his constitutional right to trial by jury (T.S.H. (II), pp. 30-34; T.R., pp. 48-49; App., ppg. 57-59, 13-14). Consequently, petitioner was tried by a judge alone on December 2 and 3, 1976.

During the course of the trial the drugs and address book seized from the purse were introduced into evidence as was the money taken from petitioner (T.E., pp. 145-146, 157-159). Although the knife seized from petitioner was not physically available at the time of trial, prosecution witnesses referred to it in the course of their testimony (T.E., pp. 145,160).

At the conclusion of the presentation of evidence, the defense renewed its motion to suppress (T.E., p. 216). The trial judge then withheld the verdict and allowed the prosecution and defense to file simultaneous briefs on the merits of the suppression motion (T.E., p. 234; T.R., p.56; App., p. 16).

On February 11, 1977, the trial court again overruled the defense motions to suppress and also determined that petitioner was without standing to object to the search of Ms. Cox's purse and the seizure of the drugs found in the purse (T.R., pp. 90-94; App., pp. 18-22).

That same day petitioner, contrary to his plea, was convicted in the Warren Circuit Court of the offense of

trafficking in a controlled substance classified in Schedule I in violation of KRS 218A.990(2) and was sentenced to imprisonment for five years and a fine of three thousand dollars ($3,000.000). Petitioner was also convicted of four counts of possession of controlled substances classified in Schedules II and III in violation of KRS 218A.990(6) and sentenced on each count to confinement in the county jail for one year and a fine of five hundred dollars ($500.00) (T.R., pp. 95-96; App., pp. 22-23). The sentences of confinement were to run concurrently for a total of five years of imprisonment (T.R., p. 101; App., p. 25).

In a timely motion for a new trial, petitioner again asserted that the searches and seizures in his case were in violation of the United States Constitution (T.R., p. 97; App., p.24). That motion was denied on March 11, 1977 and final judgment was entered that same day (T.R., p 101; App., p 25-26). A timely notice of appeal was filed by petitioner (T.R., p. 102; App., p. 27).

On February 17, 1978 the Court of Appeals of Kentucky rendered it opinion in petitioner's case and affirmed the judgement of conviction and sentence. *David Rawlings v. Commonwealth,* Court of Appeals of Kentucky, File No. CA-1185-MR, decided February 17, 1978 (App., pp. 61-67). Kentucky's intermediate appellate court noted that on appeal petitioner essentially "contends that he had standing to complain about the search of Ms. Cox's purse; that the search of Ms. Cox's purse was not authorized by the warrant, based on probable cause, or justified by the exigencies of the circumstances involved; that the search warrant for the premises did not authorize the search of all persons on the premises; and that their detention was not based upon probable cause and was, in effect, unreasonable restriction of their freedom" (App., p. 62).

The Court of Appeals determined that petitioner "did have standing to protest the search of Ms. Cox's purse," but decided the search of the purse was not invalid (App., pp. 63-65).

On June 9, 1978 the Kentucky Court of Appeals denied petitioner's petition for rehearing (App., p. 68). At that time, a dissenting opinion was filed in the case (App., pp. 69-74). the dissenting judge concluded that petitioner and Ms. Cox had been illegally arrested in violation of the Fourth Amendment and that this initial illegality rendered the subsequent searches and seizures also unconstitutional (App., p. 70-73). The dissenter also rejected the majority's holding that the search of Ms. Cox's purse was within the scope of a warrant authorizing only the search of the premises (App., p. 73-74).

Petitioner's timely motion for discretionary review was granted by the Supreme Court of Kentucky on November 14, 1978 (App., p. 75). On May 1, 1979 the Kentucky Supreme Court rendered its opinion in petitioner's case and affirmed the opinion of the Court of Appeals (App., pp. 76-83). *Rawlings v. Commonwealth,* Ky., 581 S.W.2d 348 (1979).

According to the majority opinion, "[t]he central issue in this case is the warrantless search of Vanessa Cox's purse." *Id.* at 349. In resolving that issue, the Kentucky court was "confronted with the proposition of 'standing' on the part of [petitioner] to raise the Fourth Amendment issue and the ultimate issue - the merits of the Fourth Amendment argument." *Id.*

The majority opinion of the Kentucky Supreme Court unabashedly announced, "All in all we confess that we find the concept of 'standing' totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally

incapable of understanding." *Id.*

Nevertheless, the majority held "the evidence obtained by the search of Vanessa Cox's Purse was properly admitted at trial" and noted that petitioner "*probably* does not have standing to raise the issue here." *Id.* at 349 (emphasis added).

The majority acknowledged that *Jones v. United States,* 362 U.S. 257 (1960), "apparently would confer standing on the theory that possession of the drugs both convicts and confers standing since the offense here is possession, admitting ownership is admitting guilt." *Id.* But the Kentucky Supreme Court reasoned that petitioner "did not find himself in that dilemma" because "he admitted ownership of the drugs when the drugs appeared from the purse and Vanessa Cox stated the drugs belonged to him." *Id.*

Although admittedly "not sure of the effect of" *Rakas v. Illinois,,* 439 U.S. 128 (1978), the majority of the Kentucky court felt *Rakas* "seems to reject the theory of *Jones* on 'standing.' " *Rawlings v. Commonwealth, supra* at 349-350. Consequently, the Kentucky Supreme court held "the search of Vanessa Cox's purse did not violate [petitioner's] legitimate or reasonable expectation of freedom from governmental intrusion." *Id.* at 350.

Addressing the issue of the search of petitioner's person, the majority "prefer[red] to validate this search on the theory of a search incident to a valid arrest." *Id.*

Addressing the issue of the search of petitioner's person, the majority "prefer[red] to validate this search on the theory of a search incident to a valid arrest." *Id.* The Kentucky Supreme Court emphatically stated its intention to "disregard as irrelevant the detention during which the officers were procuring a search warrant." *Id.*

Justice Lukowsky of the Kentucky Supreme Court filed a

dissenting opinion in the instant case and concluded that "[t]he searches and seizures which occurred were the fruits of unlawful arrests and should be suppressed." *Id.* at 350, citing *Wong Sun v. United States,* 371 U.S. 481 (1963). Justice Lukowsky reasoned that the conduct of the police officers who "would not allow those present to leave the room or the premises unless they would submit to a search . . . constituted an arrest because it significantly deprived those individuals of their freedom of action." *Rawlings vs. Commonwealth, supra* at 350, citing *Terry v. Ohio,* 392 U.S. 1 (1968).

According to the dissenting justice, this "was not an investigatory stop but an arrest because the detention here went well beyond the bounds of permissible investigatory stops." *Rawlings v. Commonwealth, supra* at 350. Justice Lukowsky emphasized that this arrest of petitioner and the others was unlawful because "no misdemeanor had been committed in the presence of the police officers." *Id.* at 350-351.

As the dissent explains, "[b]ut for the unlawful detention of [petitioner] and the others present in the house, the police would not have discovered any evidence against [petitioner]." *Id.* at 351. All the discovered evidence "was a result of the unlawful detention and should be suppressed as 'fruit of the poisonous tree.' " *Id.*

In the second portion of his dissent, Justice Lukowsky explained that, even if petitioner and the others present were not illegally arrested during the forty-five minute detention, "the search of Cox's purse was unlawful because the search was beyond the perimeter of the search warrant and consequently unreasonable under the Fourth Amendment." *Id.* at 351. The dissent perceived the "real issue" as "whether [petitioner] should be permitted to raise the clear

violation of Cox's Fourth Amendment rights as a violation of his own on the basis that he owned the property seized and the offense charged is the possession of that property." *Id.*

The dissent characterized *Rakas* as "substantially different from the instant case" since it "involved a non-possessory offense and the articles seized were not owned by or in the possession of the defendants." *Rawlings v. Commonwealth, supra* at 351, citing *Rakas v. Illinois, supra* at 130 n.1. The dissenting justice acknowledged that *Rakas* had "reformulated the test for standing to contest a search," but added that the decision "left undisturbed the automatic standing rule articulated in *Jones v. United States,* [citation omitted], for possessory offenses." *Rawlings v. Commonwealth, supra* at 351-352.

Because petitioner "is charged with a possessory offense," the dissenting justice chastised that "the Commonwealth should not be heard to say that his possession of these drugs is sufficient to support his conviction but insufficient to support a reasonable expectation of privacy when they are concealed in the purse of a companion." *Id.* at 352. According to the dissent, petitioner "was entitled to expect that governmental officials would intrude into the purse only with consent or by complying with the Fourth Amendment." *Id.* Because "the search of Cox's purse was an unreasonable search and seizure," the dissenting judge reasoned "its results should be suppressed." *Id.*

Lastly, addressing the search of petitioner's person, the dissent found that search "unlawful because it was not incident to a valid arrest." *Id.* The " 'second' arrest upon which the search was based was itself unlawful because it was based upon the fruits of the illegal search for and seizure of the drugs in Cox's purse." *Id.*

SUMMARY OF ARGUMENT

I.

As a general rule, Fourth Amendment rights may not be vicariously asserted. Ordinarily, one who seeks to challenge the legality of a search as a basis for suppressing relevant evidence is required to allege, and if the allegation be disputed to establish, that he himself was the victim of an invasion of privacy.

Although this Court has recently discarded as analytically unhelpful the "standing" terminology, the nomenclature of "standing" provides a shorthand method of identifying, at least historically, the interests of the defendant which the Fourth Amendment was designed to protect.

In the now obsolete phraselogy of "standing," a defendant, to contest a search or seizure on Fourth Amendment grounds, must have either "automatic standing" (standing implied as a matter of law) or "actual standing" (standing established by the facts of the case).

The Supreme Court of Kentucky rejected David Rawlings' clear constitutional entitlement to challenge the search of Ms. Cox's purse on the basis of either *actual* or *automatic* standing and held the evidence obtained by the warrantless search of the purse was properly admitted at trial.

The applicability of the automatic standing rule has apparently been delimited to cases where the defendant is charged with an offense that includes, as an essential element of the charged crime, possession of the seized evidence at the time of the contested search and seizure. All of the factors in the instant case - the nature of the offenses,

the form of the charges, the prosecution's theory, and the Commonwealth's evidence in chief - clearly entitle petitioner to automatic standing.

Two distinct and severable constitutional problems both justify and necessitate continued adherence to the rule of automatic standing: (1) "the self-incrimination dilemma" which inheres in a defendant's need to allege possession to contest a seizure, when such an admission could later be used against him; and (2) "the vice of prosecutorial self-contradiction" which would allow the prosecution to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes.

Although a defendant is now permitted to establish standing by claiming possession of incriminating evidence without that testimony being directly admissible against him at the trial, three substantial aspects of self-incrimination continue to plague the defendant whose testimony is needed to challenge the legality of a search and seizure.

First, a defendant who wishes to testify at the suppression hearing on his entitlement to challenge the search and seizure must weigh the very real risk that the prosecution may use the defendant's suppression testimony to impeach his trial testimony. Second, in those jurisdictions which permit prior inconsistent statements to be introduced at trial as substantive as well as impeachment evidence, a defendant, desiring to testify on his own behalf at a suppression hearing to establish standing, must seriously question whether the prosecution will be constitutionally entitled to introduce as substantive evidence of guilt any of his statements from the suppression hearing which would marginally qualify as inconsistent with his trial testimony. Third, the prosecution continues to have the ability to exploit the defendant's testimony at the suppression hearing

to extricate incriminating information which may generate investigative leads to enhance the government's case on the existing charges or to produce new, but related charges against the accused.

Since several aspects of the self-incrimination dilemma - notably impeachment, substantive use of prior inconsistent statements, and prosecutorial "fishing expeditions," whether eventually prohibited or destined to be exceptions to the general rule, persist, the dilemma itself endures as a constitutional problem of sufficient magnitude not only to justify, but to mandate the contined viability of the principle of "automatic standing."

The incongruity associated with the vice of prosecutorial self-contradiction is readily apparent where the prosecution at the suppression hearing defeats the defendant's standing claim by vigorously asserting that the defendant has failed to demonstrate any possessory interest in the premises searched or the evidence seized, but then at trial presents witnesses whose testimony is solely calculated to establish a sufficient possessory connection between the accused and the seized evidence to sustain a conviction of the charged possession offenses. This hypothetical illustrates the concern that a rule of "automatic" standing is needed to preclude "the injustice of an internally inconsistent conviction."

When the prosecution's entire case - the offense charged, the theory of the offense, and the supporting evidence - ultimately depends on the defendant's possession, as construed under the applicable penal law, of the evidence seized during the challenged search, the state should not be granted the prerogative of denying at a suppression hearing that the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was

designed to protect.

Assuming *arguendo* that petitioner was not entitled to "automatic" standing to contest the search and seizure at bar, he still met his burden of establishing actual standing due to his admission of ownership of the drugs seized from Ms. Cox's purse both at the time of the search and later at the suppression hearing. This Court has repeatedly acknowledged the constitutional tenet that an actual ownership or possessory interest in that which was seized confers standing to challenge the search and seizure.

There can be no doubt, either historically or analytically, that the Fourth Amendment was designed to protect against governmental infringement of an actual ownership or possessory interest in the property seized, even when the seizure occurred during a search of the person or premises of a third party.

An individual's right to privacy from governmental intrusion into his personal effects does not require that he have physical control of the property. He can reasonably expect that his lawfully possessed effects will remain undisturbed upon premises where they have been lawfully placed or in the custody of a third party to whom they are lawfully entrusted. The key factor in this "standing" analysis is that the defendant must demonstrate *actual* ownership or possessory interest in the property seized.

A determination of the contraband nature of the property seized is an artifical factor for evaluating whether a defendant has a cognizable Fourth Amendment interest in the evidence seized from a third party since this reasoning would impermissibly convict the suspect even before the evidence against him was gathered. The use of a "contraband" criterion for ascertaining whether a Fourth Amendment right has been violated would, in many

instances, expand the suppression hearing into a miniature replica of the trial on the merits.

The capacity to claim the protection of the Fourth Amendment depends upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.

Petitioner took normal precautions to maintain his privacy by placing various items including the drugs in Ms. Cox's purse; this was accomplished with her knowledge. Petitioner's ownership or possessory interest in the items he placed in Ms. Cox's purse created a legitimate expectation of privacy.

It was undoubtedly reasonable for petitioner to expect that the items he entrusted to Ms. Cox for storage and even transportation in her purse would remain private to the rest of the world. The expectation of privacy was more than a subjective expectation of not having the items discovered, it was an expectation that society is prepared to recognize as reasonable.

In the final analysis petitioner was constitutionally entitled to contest the legality of the search of Ms. Cox's purse on three distinct, but invariably intertwined concepts - the "automatic" standing rule, standing generated by an actual possessory or ownership interest in the property seized, and a "reasonable and legitimate expectation of privacy." All three of these methodologies function to demonstrate that the police search of Ms. Cox's purse and the seizure of petitioner's personal property infringed an interest of the petitioner which the Fourth Amendment was designed to protect.

II.

The searches of both Vanessa Cox and petitioner, the seizure of evidence from both parties, and the statements by both parties incriminating petitioner were the fruits of the unlawful arrests of Ms. Cox and petitioner and, consequently, must be suppressed.

There can be little doubt that petitioner, Vanessa Cox, and the three other people present were seized when they were told by the police that they must remain at the Marquess residence unless they consented to a search of their persons and effects. Whenever a police officer accosts an individual and restrains his freedom to walk away, he has seized that person.

In all but certain narrowly defined intrusions, the seizures are reasonable only if supported by probable cause. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed arrests or investigatory detentions.

The warrantless arrest/detention of petitioner and the other people present at the Marquess residence was unconstitutional because it was not supported by probable cause to arrest.

The detention of Ms. Cox and petitioner was in important respects indistinguishable from traditional arrest. All of the perons present were specifically informed by the police that they could not leave the premises unless they would agree to waive a Fourth Amendment right and submit to a search of their person and effects. The period of detention lasted approximately forty-five minutes during which the detainees were under the personal supervision of some four or five police officers.

Petitioner, Vanessa Cox, and one other individual were detained for approximaely forty-five minutes. The detention was not accomplished as a formal arrest and it was not for the purpose of custodial interrogation. Nevertheless, this detention of petitioner and the others was an investigatory seizure which intruded so severely on the interests protected by the Fourth Amendment that it could be justified only on the basis of probable cause to arrest.

Accordingly, all evidence discovered in the case at bar was a result of this unlawful detention and should be suppressed as "fruit of the poisonous tree."

III.

The warrantless search of Ms. Cox's purse was unconstitutional and the evidence seized from within must be suppressed since no exigent circumstances existed.

At the time of the search and seizure in question, the police possessed a warrant, authorizing a search of the premises, but not a search of the individuals on the premises.

Each person present in Lawrence Marquess' residence on the date in question was clothed with constitutional protection against an unreasonable search or an unreasonable seizure. That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by Lawrence Marquess, the person who resided at the house in question. Although the search warrant, if issued upon probable cause, provided the officers with authority to search the premises, it provided them with no authority whatever to invade the constitutional protections possessed individually by the persons legitimately on the premises.

A person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.

A warrant to search a place cannot normally be construed to authorize a search of each individual in that place. The warrant for the search of the Marquess residence provided no basis for departing from this general rule.

No distinction may be drawn between Ms. Cox's personal effects and the purse. At all relevant times the purse was in close proximity to Ms. Cox and the police treated the purse as her property, not as an adjunct of the premises.

A warrant authorizing the search of the premises may not be used as a basis for searching the people present at the time the warrant is executed.

The prosecution and the police officers attempted to justify the search of Ms. Cox on the grounds that fear for their personal safety, under the circumstances of the case, motivated and permitted their actions. Yet, the initial search of Ms. Cox's purse was simply not supported by a reasonable belief that she was armed and presently dangerous, a belief which must form the predicate to a patdown of a person for weapons.

In the final analysis, the prosecution was unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that Venessa Cox or petitioner was armed and dangerous.

A law enforcement officer for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted. But nothing in this doctrine can be understood to allow a generalized cursory search for weapons. The narrow scope of this exception does not permit a frisk for weapons on less than reasonable belief or

suspicion directed at th person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place.

The prosecution's improper use of both the items, including the drugs in question, illegally seized from Ms. Cox's purse and petitioner's tainted admissions of ownership of the drugs renders petitioner's state court conviction constitutionally invalid and mandates reversal of the conviction below.

IV.

The court below validated the search of petitioner's person on the theory of a search incident to a valid arrest and observed that, after petitioner admitted ownership of the drugs, the police were entitled to arrest and search his person, or search and then arrest. This analysis, however, is susceptible to challenge.

Assuming *arguendo,* first, that petitioner is constantly entitled to challenge the search of Ms. Cox's purse and the attendant seizure of the contraband drugs and, second, that the search of that purse and the seizure of its contents were constitutionally improper, then the virtually contemporaneous arrest and search of petitioner, predicated on the prior illegality, were the "fruits of the poisonous tree" and any evidence obtained thereby must be suppressed.

Virtually no time elapsed between the primary illegality and the search and arrest of petitioner; similarly, no intervening circumstances occurred. All in all, no factor exists which arguably could dissipate the taint of the primary illegality.

Accordingly, the items seized during the search of petitioner were required to be suppressed and excluded in all

manner from petitioner's state trial. This failure to suppress constituted a substantial violation of petitioner's Fourth and Fourteenth Amendment rights which mandates reversal of petitioner's conviction.

ARGUMENT

I.

PETITIONER HAS STANDING TO RAISE A CLEAR VIOLATION OF VANESSA COX'S FOURTH AMENDMENT RIGHTS AS A VIOLATION OF HIS OWN CONSTITUTIONAL RIGHTS ON THE BASIS THAT HE OWNED THE PROPERTY SEIZED AND THE OFFENSE CHARGED IS THE UNLAWFUL POSSESSION OF THAT PROPERTY.

As a general rule, Fourth Amendment rights may not be vicariously asserted.[4] *Alderman v. United States,* 394 U.S. 165, 174 (1969); *Rakas v. Illinois,* 439 U.S. 128, 133-134 (1978). "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if

[4]"Fourth Amendment rights are personal rights which, like some other constitutional rightrs, may not be vicariously asserted." *Alderman v. United States,* 394 U.S. 165, 174 (1969), cited with approval in *Rakas v. Illinois,* 439 U.S. 128, 133-136 (1978); *see Brown v. United States,* 411 U.S. 223, 230 (1973); *Simmons v. United States,* 390 U.S. 377, 389 (1968). However, the "automatic standing" rule of *Jones v. United States,* 362 U.S. 257 (1960), "is, of course, one which may allow a defendant to assert the Fourth Amendment rights of another." *Rakas v. Illinois, supra* at 135 n.4.

the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." *Jones v. United States,* 362 U.S. 257, 261 (1960).

For years the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure had been evaluated, at least in phraseology, in terms of "standing." *See Jones v. United States, supra.*

In 1978 in *Rakas v. Illinois, supra,* this Court had "occasion to re-examine the 'standing' terminology emphasized in *Jones*" to consider "the necessity for continued adherence to the notion of standing . . . as a concept that is theoretically distinct from the merits of a defendant's Fourth Amendment claim." *Rakas v. Illinois, supra* at 133.

After reaffirming the principle that the rights assured by the Fourth Amendment "may be enforced by exclusion of evidence only at the instance of one whose own protection was infringed by the search and seizure,"[5] this Court addressed the question of "whether it serves any useful analytical purpose to consider this principle a matter of standing, distinct from the merits of a defendant's Fourth Amendment claim." *Id.* at 138-139.

Endorsing the "[r]igorous application of the principle that the rights secured by [the Fourth] Amendment are personal, in place of a notion of 'standing,' " this Court reasoned that, even though "the inquiry under either approach is the same," the "better analysis forthrightly focuses on the extent of a particular defendant's rights under the Fourth Amendment, rather than on any theoretically separate, but invariably intertwined concept of standing." *Id.* at 139.

This Court in *Rakas* was admittedly "under no illusion

[5]*Simmons v. United States,* 390 U.S. 377, 389 (1968).

that by dispensing with the rubric of standing used in *Jones*," it had "rendered any simpler the determination of whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure." *Rakas v. Illinois, supra* at 140.

The *Rakas* decision, in effectuating a change in parlance and methodology but not substantive inquiry, has generated some confusion among various trial and appellate courts of this Nation concerning the continued constitutional viability in Fourth Amendment matters of the analytical principles which had been subsumed under the label "standing."[6] This confusion is nowhere better expressed than in petitioner's case where the Supreme Court of Kentucky unabashedly announced, "All in all we confess that we find the concept of 'standing' totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally incapable of understanding." *Rawlings v. Commonwealth,* Ky., 581 S.W.2d 348, 349 (1979).

Even though the *Rakas* decision discarded as analytically unhelpful the "standing" terminology, the nomenclature of "standing" persists in the lexicon of the appellate courts and provides a shorthand method of identifying, at least historically, the interests of the defendant which the Fourth Amendment was designed to protect.[7]

Viewed in the now obsolete phraseology of "standing," a defendant, to contest a search or seizure on Fourth Amendment grounds, must have either "actual standing" or

[6]*See United States v. Mazzelli,* 595 F.2d 1157, 1159-1160 (9th Cir. 1979); *United States v. Bruneau,* 594 F.2d 1190, 1193 n. 3 (8th Cir. 1979); *United States v. Salvucci,* 599 F.2d 1094, 1097-1098 (1st Cir. 1979); *United States v. Byers,* 600 F.2d 1130, 1132 (5th Cir. 1979); *United States v. Balsamo,* 468 F.Supp. 1363, 1378 (S.D. Me. 1979); *Burns v. State,* Okl. Cr., 595 P.2d 801, 803 (1979).

[7]See the cases listed at note 6, *supra.*

"automatic standing." *United States v. Balsamo,* 468 F.Supp. 1363, 1378 (S.D. Me. 1979). "[S]tanding to move to suppress can either be implied as a matter of law (automatic standing) or established by the facts of the case (actual standing)." *United States v. Cella,* 568, F.2d 1266, 1280 (9th Cir. 1977), citing *United States v. Guerrera,* 554 F.2d 987, 989 (9th Cir. 1977); *United States v. Boston,* 510 F.2d 35, 37 (9th Cir. 1974), *cert. denied,* 421 U.S. 990 (1975).

Prior to 1960, under "the conventional standing requirement," courts had "generally required that the movant [seeking to suppress evidence obtained as a result of an unconstitutional search and seizure[claim either to have owned or possessed the seized property or to have had a substantial possessory interest in the premises searched." *Jones v. United States, supra* at 261.

By claiming ownership or possession of the seized property or by claiming a substantial possessory interest in the premises searched, a defendant could establish *actual* standing to contest the search and seizure. Throughout the evolution of the concept of standing to raise Fourth Amendment violations, this Court has acknowledged the constitutional principle that an actual ownership or possessory interest in that which was seized confers standing to challenge the search and seizure.[8]

The *Jones* decision "established a rule of 'automatic' standing to contest an allegedly illegal search where the same possession needed to establish standing is an essential element of the offense charged." *Rakas v. Illinois, supra* at 135.

[8]*Simmons v. United States,* 390 U.S. 377, 390-391 (1968); *Mancusi v. DeForte,* 392 U.S. 364, 367 (1968); *Brown v. United States,* 411 U.S. 223, 228 (1973); *Rakas v. Illinois, supra* at 130 n.1, 142 n.11, 148.

When "possession of the seized evidence is itself an essential element of the offense with which the defendant is charged, the Government is precluded from denying that the defendant has the requisite possessory interest to challenge the admission of the evidence." *Simmons v. United States,* 390 U.S. 377, 390 (1968).

Automatic standing "elimintes any necessity for a preliminary showing of an interest in the premises searched or the property seized, which ordinarily is required when standing is challenged." *Jones v. United States, supra* at 263. "The possession on the basis of which [a defendant] is to be . . . conficted suffices to give him standing." *Id.* "In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure' upon a motion to suppress evidence prior to trial." *Id.* at 264.

According to the Supreme Court of Kentucky, "[t]he central issue in [petitioner's] case is the warrantless search of Vanessa Cox' of Vanessa Cox's purse." *Rawlings v. Commonwealth, supra,* at 349. In resolving that issue, the Kentucky court was "confronted with the proposition of 'standing' on the part of [petitioner] to raise the Fourth Amendment issue and the ultimate issue - the merits of the Fourth Amendment argument." *Id.*

The Supreme Court of Kentucky, rejecting petitioner's clear constitutional entitlement to challenge the search of Ms. Cox's purse on the basis of either *actual* or *automatic* standing, concluded that petitioner "probably does not have standing to raise the issue" of the warrantless search of the purse and held the evidence obtained by the search "was properly admitted at trial." *Rawlings v. Commonwealth, supra* at 349. This decision to deny petitioner standing was made in the context of the Kentucky Supreme Court's

"confusion" that "the concept of 'standing' [is] totally incomprehensible and, to the extent of overlap with Fourth Amendment rights, equally incapable of understanding." *Id.* at 349.

The *Rawlings* court acknowledged that *Jones v. United States, supra,* "apparently would confer standing on the theory that possession of the drug both convicts and confers standing since the offense here is possession, admitting ownership is admitting guilt." *Rawlings v. Commonwealth, supra* at 349. However, the Kentucky Supreme Court attempted to distinguish the instant case from *Jones* on the basis that petitioner "did not find himself in that dilemma" because "he admitted ownership of the drugs when [the drugs] appeared from the purse and Vanessa Cox stated the drugs belonged to him." *Id.* Furthermore, the *Rawlings* majority dismissed the "automatic standing" rule because "*Simmons* established that evidence to show standing is not admissible, over objection, on the issue of guilt." *Rawlings v. Commonwealth, supra* at 349.

The Kentucky Supreme Court added that they were "not sure of the effect of *Rakas,*" but felt that the decision "seems to reject the theory of *Jones* on 'standing.' " *Rawlings v. Commonwealth, supra* at 349-350. Consequently, the *Rawlings* court held "the search of Vanessa Cox's purse did not violate [petitioner's] legitimate or reasonable expectation of freedom from governmental intrusion." *Id.* at 350.

A. PETITIONER WAS ENTITLED TO AUTOMATIC STANDING TO CONTEST THE SEARCH OF VANESSA COX'S PURSE BECAUSE HE WAS CHARGED WITH OFFENSES THAT INCLUDED, AS AN ESSENTIAL ELEMENT OF EACH OFFENSE CHARGED, POSSESSION OF THE SEIZED EVIDENCE AT THE TIME OF THE CONTESTED SEARCH AND SEIZURE.

The applicability of the automatic standing rule has apparently been delimited to cases "where possession at the time of the contested search and seizure is 'an essential element of the offense . . . charged.' "[9] *Brown v. United States,* supra at 228. The "automatic standing" rule is not applicable to a situation where "the Government's case against [the defendant] does not depend on [the defendant's] possession of the seized evidence at the time of the contested search and seizure." *Id.* at 228. There is no automatic standing to contest a search and seizure where the defendant was "not charged with an offense that includes, as

[9]This is the most restrictive formulation of the test for applicability of the "automatic standing" rule. Consequently, lower courts have been particularly sensitive to the possibility that a prosecutor may draft the charges in a manner which would appear to negate the defendant's entitlement to automatic standing, such as charging the possession offense occurred on a specific date either before or after the contested search and seizure. For example, in *United States v. Tortorello,* 533 F.2d 809, 814 n.3 (2nd Cir. 1976), the court did "not find controlling... the fact that the indictment charged the defendant with receiving, concealing and storing the stolen coffee '[o]n or about April 23, 1973,' while the search took place on April 30th, several days later." The *Tortorello* court noted that "[t]he dates set forth in the indictment seem to be approximations, since there appears to be no evidence which directly shows that the defendant possessed the [stolen] coffee on April 23rd." *Id. See State v. Matthews,* N.D., 216 N.W.2d 90, 98-99 (1974).

an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure." *Id.* at 229.

There is no doubt that, under the circumstances of the instant case, petitioner was entitled to "automatic standing," even under the most conservative formulation of that doctrine.

Petitioner was charged with five counts of trafficking in controlled substances classified in Schedules I, II and III in violation of KRS 218A.990(2)[10] (T.R., pp. 1-4, 9; App., pp. 4-8). Each of the five indictments alleged that petitioner did, "[o]n or about the 18[th] day of October A.D., 1976, . . . have in his possession, for the purpose of sale," the specific controlled substance which formed the basis of the charge.

The prosecution's theory of culpability charged in each of the five indictments was "possession, for the purpose of sale."[11]

Petitioner was convicted of one count of trafficking in a controlled substance classified in Schedule I and four counts of possession of controlled substances classified in Schedules II and III (T.R., pp. 95-96; App., pp. 22-23).

Equally significant is the fact that the search in question

[10]KRS 218A.990(2) provides that "[a]ny person who knowingly and unlawfully traffics in a controlled substance classified in Schedule I or II other than narcotic drug, except marijuana, or in any controlled substance classified in Schedule III" commits a criminal offense. "Traffic," as used in KRS 218A.990(2), "means to manufacture, sell, transfer or possess with intent to sell a controlled substance." KRS 218A.010(19).

[11]The majority opinion of the Kentucky Supreme Court in the case at bar conceded that under the principles enunciated in *Jones* "possession of the drugs both convicts and confers standing since the offense here is possession." *Rawlings v. Commonwealth, supra* at 349. The dissent below emphasized that "Rawlings is charged with a possessory offense." *Id.* at 352.

occurred on October 18, 1976 - the date of the offense charged in each of the indictments.

At trial, over defense objection, Vanessa Cox, a prosecution witness, testified as to petitioner's statements and actions following the search of her purse which indicated petitioner's ownership of the contraband drugs (T.E., pp. 29-31). Similarly, Railey and Bivens, both state police narcotics agents, testified during the prosecution's case in chief concerning petitioner's admissions of ownership of the drugs in question immediately following the contested search (T.E., pp. 149-151, 155-156). Dennis Saddler's testimony for the prosecution also recounted substantially the same information (T.E., pp. 100-101).

All of the factors - the nature of the offenses, the form of the charges, the prosecution's theory, and the Commonwealth's evidence in chief - clearly entitle petitioner to "automatic standing."

In *Jones* this Court identified two distinct and severable constitutional problems which both justified and necessitated the adoption of the rule of automatic standing: (1) "the self-incrimination dilemma . . . inherent in a defendant's need to allege 'possession' to contest a seizure, when such admission of possession could later be used against him;" and (2) "the vice of prosecutorial self-contradiction," which would allow "the Government to allege possession as part of the crime charged, and yet deny that there was possession sufficient for standing purposes." *Brown v. United States, supra* at 227, 229, citing *Jones v. United States, supra* at 262-264.

In *Rakas* this Court observed that it had "not yet had occasion to decide whether the automatic-standing rule of *Jones* survives [the] decision in *Simmons*." *Rakas v. Illinois, supra* at 135 n.4, citing *Brown v. United States,*

supra at 228-229 (1973). This Court in *Brown* had "reserve[d] that question for a case where possession at the time of the contested search and seizure is 'an essential element of the offense . . . charged." *Brown v. United States, supra* at 228, citing *Simmons v. United States, supra* at 390.

1. The Dilemma of Self-Incrimination

In *Brown*, this Court explained that "[t]he self-incrimination dilemma, so central to the *Jones* decision, can no longer occur under the prevailing interpretation of the Constitution" because "a prosecutor may not use against a defendant at trial any testimony given by that defendant at a pretrial hearig to establish standing to move to suppress evidence." *Brown v. United States, supra* at 228, citing *Simmons v. United States, supra* at 389-394. "[U]nder the *Simmons* doctrine the defendant is permitted to establish the requisite standing by claiming 'possession' of incriminating evidence" and, "whether he succeeds or fails to suppress evidence, his testimony on that score is not directly admissible against him in the trial." *Brown v. United States, supra* at 228.

But the *Brown* decision did "not decide" whether the "automatic" standing rule of *Jones* should remain extant "now that [the] decision in *Simmons* has removed the danger of coerced self-incrimination." *Brown v. United States, supra* at 229.

A determination of the continued viability of the doctrine of automatic standing should not begin with the assumption that the dilemma of self-incrimination was entirely removed or resolved by the *Simmons* decision. Indeed, three substantial aspects of self-incrimination continue to plague the defendant whose testimony is needed to establish standing to challenge the legality of a search and seizure.

a. The Threat of Impeachment

Despite the *Simmons* decision, a defendant who wishes to testify at the suppression hearing on the question of his entitlement to challenge the search and seizure, must weigh the very real risk that the prosecution may use the testimony given at the suppression hearing to impeach the defendant's trial testimony.

Various state appellate courts have endorsed the principle that "the testimony of a defendant or documents voluntarily attested to by him in conjunction with his motion to suppress evidence may not be introduced by the State directly in its case in chief but may be used for purposes of impeachment should the defendant choose to testify at trial." *People v. Sturgis,* 58 Ill.2d 211, 317 N.E. 2d 545, 548 (1974).

A defendant who testifies at a suppression hearing may be required "to answer all relevant questions addressed to him on cross-examination regarding his testimony on the motion to suppress evidence," but then will not be permitted "to contradict his testimony at a later trial on the merits." *State v. Petrovich,* 125 N.J. Super. 147, 309 A.2d 281, 283-284 (1973).

"A defendant's testimony at a suppression hearing may be used for impeachment purposes if he takes the stand at his trial and testifies in a manner inconsistent with his pretrial testimony." *People v. Douglas,* 66 Cal.App.3d 998, 136 Cal.Rptr. 358, 363 (1977).

The wording of this Court's holding in *Simmons* was only that "when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial *on the issue of guilt* unless he makes no objection." *Simmons v. United States, supra* at 394; emphasis added.

Subsequently, in an endeavor to reiterate the thrust of the *Simmons* holding, this Court paraphrased the rule by noting that "whether he succeeds or fails to suppress the evidence, [a defendant's] testimony [to establish the requisite standing] is not *directly admissible against him* in the trial." *Brown v. United States, supra* at 228; emphasis added. This Court has also observed that "*Simmons* barred the use of pretrial testimony at trial to prove its incriminating content." *United States v. Kahan,* 415 U.S. 239, 243 (1974).

Although this Court has not yet addressed this precise issue, it has concluded in a different context that "[t]he protective shield of *Simmons* [if applicable] is not to be converted into a license for false representations on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood." *United States v. Kahan, supra* at 243, citing *Harris v. New York,* 401 U.S. 222, 226 (1971).

The issue of whether the protective shield of *Simmons* precludes the prosecution's use of a defendant's testimony at a suppression hearing to impeach his trial testimony is obviously not presented in the instant case and petitioner does not presume to suggest its ultimate resolution.[12] But, the

---

[12]The prosecution's use of excluded evidence to impeach a defendant's trial testimony has been addressed by this Court on several occasions.

The prosecutorial ploy of cross-examining a defendant at trial in a manner intended to elicit responses which would justify the admission of suppressed evidence in rebuttal was condemned by this Court long ago. *Agnello v. United States,* 269 U.S. 20 (1925). However, a "defendant's assertion on direct examination [at trial for sale of narcotics] that he never possessed any narcotics" was held in *Walder v. United States,* 347 U.S. 62 (1954), to have "opened the door, solely for the purpose of attacking the defendant's credibility, to evidence of the heroin unlawfully seized [and suppressed] in connection with an earlier proceeding." *Id.* at 64.

(continued)

existence of this unresolved facet of the self-incrimination dilemma should not be overlooked as an actual deterrent to a criminal defendant's right to seek a judicial determination of his Fourth Amendment claim.[13]

In some jurisdictions once the trial judge is satisfied that a defendant's testimony on the merits is "inconsistent" with prior statements given by the accused at the suppression hearing, he may allow the protective shield of *Simmons* to be lowered, at least for the limited purpose of assailing the

---

(footnote continued from preceding page)

In *Harris v. New York*, 401 U.S. 222 (1971), no constitutional infirmity was found in the practice of the prosecution impeaching a defendant's credibility by use of a prior statement made to the police under circumstances rendering it inadmissible under *Miranda v. Arizona*, 384 U.S. 436 (1966), to establish the government's case in chief. Recently, in *New Jersey v. Portash*, ____ U.S. ____, 99 S. Ct. 1292, 1295 (1979), this Court ruled that "a person's testimony before a grand jury under a grant of immunity cannot constitutionally be used to impeach him when he is a defendant in a later criminal trial." While "[b]alancing of interests was thought to be necessary . . . when the attempt to deter unlawful police conduct collided with the need to prevent perjury," *Portash* emphasized that "information given in response to a grant of immunity" is "compelled" in terms of "the constitutional privilege against compulsory self-incrimination" and [b]alancing, therefore, is not simply unnecessary," it is "impermissible." *Id.* at 1295. It must be remembered that a defendant's testimony at a suppression hearing to establish his right to challenge the legality of a search and seizure is similarly "compelled" because, as *Simmons* acknowledges, the defendant is confronted with the choice "either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination." *Simmons v. United States, supra* at 394. *See* LaFave, 3 *Search and Seizure, A Treatise on the Fourth Amendment*, (1980), §11.2, p. 519.

[13]"[I]t is still arguable after *Simmons*, as courts have held, that the defendant's testimony at trial may be impeached by allegations attested to by the defendant in connection with an unsuccessful motion to suppress." Ringel, *Searches & Seizures, Arrests and Confessions* (2nd Ed. 1979), §20.3(c), p. 20-15.

defendant's credibility. *People v. Douglas, supra; see Edwards v. Commonwealth*, Ky., 573 S.W.2d 640, 641 (1978).

In constructing the shield of *Simmons*, this Court accepted as "obvious that a defendant who knows that his testimony *may be admissible against him at trial* will sometimes be deterred from presenting the testimonial proof of standing necessary to assert a Fourth Amendment claim." *Simmons v. United States, supra* at 392-393; emphasis added. Significantly, the deterrence factor in *Simmons* was not confined to situations where the defendant feared his suppression testimony would be admissible on the merits of the issue of guilt or innocence. *Simmons* indicated that a deterrent effect would be generated whenever the risk existed that the defendant's suppression testimony could be "admissible against him at trial" for any reason, including impeachment purposes, limited to matters of credibility.

In this regard, the dilemma of self-incrimination survives the *Simmons* decision.

b. The Threat of Substantive Use of Prior Inconsistent Statements

As this Court has previously recognized, the evidence law in a minority of jurisdictions "permit[s] the substantive use of prior inconsistent statements on the theory that the usual dangers of hearsay are largely nonexistent where the witness testifies at trial." *California v. Green*, 399 U.S. 149, 155 (1970). Such a procedure does not run afoul of the Confrontation Clause of the federal constitution. *Id.* at 164.

In Kentucky, for example, "an out-of-court statement made by any person who appears as a witness, which statement is material and relevant to the issues of the case, may be received as substantive evidence through the

testimony of another witness, and need not be limited to impeachment purposes." *Jett v. Commonwealth,* Ky., 436 S.W.2d 788, 792 (1969).

In those jurisdictions which permit prior inconsistent statements to be introduced at trial as substantive as well as impeachment evidence, a defendant, desiring to testify in his own behalf at a suppression hearing to establish standing, must seriously question whether "the protective shield of *Simmons*" would preclude the trial judge from allowing the prosecution to introduce as substantive evidence of guilt any of his statements from the suppression hearing which would marginally qualify as inconsistent with his trial testimony.

Resort to limiting instructions to insure that jurors consider defendant's prior inconsistent statements made at a suppression hearing as only affecting his credibility and not indicating guilt would be constitutionally ineffective. Noting the inability of limiting instructions to cure certain constitutional errors, this Court has acknowledged that there may be "little difference as far as the Constitution is concerned between permitting prior inconsistent statements to be used only for impeachment purposes, and permitting them to be used for substantive purposes as well." *California v. Green, supra* at 164.

Regardless of whether a defendant's prior inconsistent statements given at a suppression hearing obtain their status as substantive evidence against the accused on the basis of a jurisdiction's evidence law or due to the realities of the courtroom, it would be myopic for the defendant or his counsel to neglect this phase of the self-incrimination dilemma in assessing the propriety of the defendant testifying at the suppression hearing to establish standing.

c. The Threat of a Prosecutorial "Fishing Expedition"

Perhaps the most serious aspect of the self-incrimination dilemma which has been virtually unaffected by the protective shield erected in *Simmons* is the ability of the prosecution to exploit the defendant's testimony at the suppression hearing to extricate incriminating information which may generate investigative leads to enhance the government's case on the existing charges or to produce new, but related charges against the accused. In the vernacular of the criminal courts, this prosecutorial technique bears the label "fishing expedition."

The fear of the prosecutorial "fishing expedition" is not a conveniently manufactured appellate argument. It is a reality that defendants and their counsel must evaluate daily in the criminal trial courts of this nation.

"[A]n alert prosecutor might well elicit from [defendants testifying at a suppression hearing] small bits of information from which he could well develop the basis for additional investigation calculated to make the State's case stronger." *Duncan v. State,* 276 Md. 715, 351 A.2d 144, 152 (1976). "This represents one of the very vices *Jones* was intended to prevent." *Id.*, 351 A.2d at 152.

In the instant case the prosecutor during the suppression hearing cross-examined petitioner in an endeavor to learn the source of petitioner's drugs, his purpose in obtaining the drugs, and the price petitioner paid for the drugs (T.S.H. (II), pp. 17-19; App., pp. 49-51). In the course of this cross-examination the prosecutor inquired when and how petitioner travelled to Bowling Green, Kentucky and what, if any, drugs were brought by petitioner to Bowling Green (T.S.H. (II), pp. 19-20; App., p. 51-52).

Taking full advantage of his opportunity to question petitioner at the suppression hearing, the prosecutor asked whether petitioner had ever offered the LSD for sale to Dennis Saddler and also the quantity of LSD Saddler had purchased (T.S.H. (II), p. 22; App., pp. 52-53). Pursuing this line of inquiry, the prosecutor asked whether petitioner has ever sold LSD to Vanessa Cox, Lawrence Marquess, or anyone else in Bowling Green (T.S.H. (II), pp. 22-23; App., pp. 52-53). Next the prosecutor blatantly inquired, "Is there anyone else beside those people who you can tell us that you sold the LSD that you had in your possession?" (T.S.H. (II), p. 23; App., p. 53). Following the trial court's overruling of a defense objection, the prosecutor reiterated a rephrased version of the question, "Can you tell this Court anybody else that you sold this to or quoted a price to that can tell this Court you had that [LSD] in your possession at any time?" (T.S.H. (II), p. 23; App., p. 53). When petitioner provided the name of such a person, the prosecutor asked where this person lived, where the sale occurred, and the identity of any other people present at that sale (T.S.H. (II), pp. 23-24; App., pp. 53-54).

Despite repeated defense objections to these questions by the prosecutor, the trial judge permitted the inquiries on the basis that the hearing was "not before a jury" and involved "a law question" (T.S.H. (II), pp. 19-24; App., pp. 51-54).

Confronted with a prosecutorial "fishing expedition" and a trial judge unsympathetic to the defendant's dilemma, defense counsel may find himself virtually powerless to stop the prosecutor's relentless search for inculpatory information and relegated to the function of registering objections.

"A defendant who testifies in a pre-trial suppression hearing is subject to cross-examination as to all issues relevant to such hearing, although not to cross-examination

on the entire case." *State v. Lukefahr,* La., 363 So.2d 661, 663 (1978). "The evidence taken at such hearing is not admissible at the trial of innocence or guilt (the merit trial)." *Id.* "If defendant's counsel feared a fishing expedition, as he claimed, his remedy (if he wished defendant to testify at the hearing) was to object to questions if irrelevant to the hearing's issues, not to offer the defendant as a witness for restricted purposes only." *Id.*

Even the prosecution's indirect or derivative use of evidence elicited from the defendant during his testimony on the question of standing should be precluded by the shield of *Simmons. See Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920); *Nardone v. United States,* 308 U.S. 338 (1939); *Wong Sun v. United States,* 371 U.S. 471 (1963). But as a practical matter, the defense would face considerable difficulty in demonstrating that, "granting establishment of the primary illegality, the evidence to which instant objection [was] made has been come at by exploitation of that illegality" instead of "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States, supra* at 488. Due to the extensive investigative resources often available to the prosecution, the defense may frequently find it unfeasible to expose that the evidence of the prosecution was derived from the accused's suppression testimony rather than the product of legitimate channels of inquiry.

Certainly the "automatic standing" rule alleviates this facet of the self-incrimination dilemma and removes a considerable impediment to the assertion of a Fourth Amendment claim.

Indeed, the death knell of the "self-incrimination dilemma" sounded in *Brown* may have been premature. *Brown v. United States, supra* at 227. Certain aspects of the

dilemma - notably impeachment, substantive use of prior inconsistent statements, and prosecutorial "fishing expeditions," whether ultimately prohibited by *Simmons* or destined to be valid exceptions to that rule, still coalesce to create "an undeniable tension" because an accused may be "obliged either to give up what he believe[s], with advice of counsel, to be a valid Fourth Amendment claim or, in legal affect, to waive his Fifth Amendment privilege against self-incrimination." *Simmons v. United States, supra* at 394.

The automatic standing rule was formulated with an awareness that where the charges "may be established through proof solely of possession" of the items seized during the contested search, a defendant seeking to satisfy "the conventional standing requirement" had traditionally been faced "with the chance that the allegations made on the motion to suppress *may be used against* him." *Jones v. United States, supra* at 261-262; emphasis added.

Because "[t]he dilemma [of self-incrimination] faced by defendants . . . is most extreme in prosecutions for possessory crimes," automatic standing was implied or presumed in cases "where possession at the time of the contested search and seizure is 'an essential element of the offense . . . charged.' " *Simmons v. United States, supra* at 228. Consequently, since several substantial facets of the self-incrimination dilemma persist despite *Simmons,* the dilemma itself endures as a constitutional problem of sufficient magnitude not only to justify, but to mandate continued adherence to the principle of "automatic standing."

2. The Vice of Prosecutorial Self-contradiction

In *Brown* this Court acknowledged "[t]he vice of allowing the Government to allege possession as part of the

crime charged and yet deny that there was possession sufficient for standing purposes." *Brown v. United States, supra* at 229. When such a tactic is employed, the prosecution can "be accused of taking 'advantage of contradictory positions.' " *Id.*, citing *Jones v. United States, supra* at 263.

Brown emphatically did "not decide" whether "this vice of prosecutorial self-contradiction warrants the continued survival of [the] *Jones*' [rule of] 'automatic' standing," but instead reserved that question for a case where possession at the time of the contested search and seizure is an essential element of the charged offense. *Brown v. United States, supra* at 228-229.

Explained in the factual context of the *Jones* decision, the prohibition against "prosecutorial self-contradiction" is erected on the premise that "to hold that [the defendant's] failure to acknowledge interest in the narcotics [seized] or the premises [searched] prevented his attack upon the search, would be to permit the Government to have the advantage of contradictory positions as a basis for conviction." *Jones v. United States, supra* at 263.

In *Jones,* the defendant's "conviction flow[ed] from his possession of the narcotics at the time of the search," and "[y]et the fruits of that search, upon which the conviction depend[ed], were admitted into evidence on the ground that [the defendant] did not have possession of the narcotics at that time." *Id.* at 263. Under such a Janus-faced approach, the prosecution "thus subject[s] the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation." *Id.* at 263. When allegations of police misconduct in violation of individual rights are evaluated in the context of a criminal prosecution, "[i]t is not consonant with the amenities, to put it midly, of the administration of criminal

justice to sanction such squarely contradictory assertions of power by the Government." *Id.* at 263-264. Consequently, "[t]he possession on the basis of which [a defendant] is to be. . . convicted suffices to give him standing under any fair and rational conception" of the circumstances which qualify a defendant as a "person aggrieved by an unlawful search and seizure." *Id.* at 264.

"In cases where the indictment itself charges possession, the defendant in a very real sense is revealed as a 'person aggrieved by an unlawful search and seizure' upon a motion to suppress evidence prior to trial." *Id.* at 264.

When a person is "charged with an offense that includes, as an essential element of the offense charged, possession of the seized evidence at the time of the contested search and seizure," the failure to extend to that person standing implied in law ("automatic" standing) to contest the legality of the search and seizure may "compel the injustice of an internally inconsistent conviction." *Jones v. United States, supra* at 264.

The incongruity contemplated in *Jones* is readily apparent where the prosecution at the suppression hearing defeats the defendant's standing claim by vigorously asserting that the defendant has failed to demonstrate any possessory interest in the premises searched or the evidence seized,[14] but then at trial presents witnesses whose testimony is solely calculated to establish a sufficient possessory connection between the accused and the seized evidence to sustain a conviction of the charged possession offense.

---

[14] "The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure." *Rakas v. Illinois, supra* at 131 n.1, citing *Simmons v. United States, supra* at 389-390, and *Jones v. United States, supra* at 261.

The hypothetical illustrates the concern expressed in *Jones* that a rule of "automatic" standing is needed to preclude "the injustice of an internally inconsistent conviction." *Jones v. United States, supra* at 265. It is the danger and inherent injustice of the "internally inconsistent conviction" which so devastatingly refuted the government's argument in *Jones* that an accused "must establish his standing to suppress the evidence [at the suppression hearing] and may not wait to rest standing upon the Government's case at the trial." *Id.* at 264.

To prevent the occurrence of "an internally inconsistent conviction," the *Jones* decision directed that "[t]he government must, in any event, not permit a conviction to be obtained on the basis of possession, without the merits of a duly made motion to suppress having been considered." *Id.* at 265 n.1.

The "vice of prosecutorial self-contradiction" has been criticized as a deficient justification for the continuation of the "automatic" standing rule on the ground that "there is no logical reason that the definition of possession accepted in interpreting criminal statutes delineate the sphere of a person's reasonable expectation of privacy." *United States v. Hunter,* 550 F.2d 1066, 1074 (6th Cir. 1977), citing Trager and Lobenfeld, The Law of Standing Under the Fourth Amendment, 41 Brooklyn L.Rev. 421 (1975). Those advancing this criticism against "automatic" standing emphasized that "[t]he Fourth Amendment and the criminal law have different purposes": the "Fourth Amendment protects a reasonable expectation of privacy," while "the criminal law is instituted to protect society from certain acts or kinds or behavior." *Id.*

The fallacy of this critique is its predication upon a fundamental misconception of the legal analysis which

generated the condemnation of prosecutorial self-contradiction in *Jones*. Proponents of this criticism intuitively conclude that "[t]he logics of the *Jones* automatic standing rule impliedly assumed that one charged with a possessory offense has had personal Fourth Amendment rights violated." *United States v. Hunter, supra* at 1073.[15] Of course, *Jones* contained no such assumption, implicit or otherwise. Instead, the *Jones* decision mandated only that when possession of the seized evidence is itself an essential element of the offense charged, "the Government is precluded from denying that the defendant had the requisite possessory interest to challenge the admission of the evidence." *Simmons v. United States, supra* at 390.

Jones did not equate as legally synonymous possession in the context of Fourth Amendment rights with possession as an element of a criminal offense. Rather, this Court in *Jones* acknowledged that in limited situations - where possession of the seized evidence at the time of the contested search is an essential element of the charge - constitutional concepts of fairness will not permit "squarely contradictory assertions of power by the Government . . . to compel the injustice of an internally inconsistent conviction." *Jones v. United States, supra* at 263-264.

The "automatic" standing rule does not dictate a determination in favor of the defendant on the merits of his Fourth Amendment claim; it only insures that the merits of

[15]According to this indictment of the "automatic" standing principle, "the implied assumption of the 'automatic standing' rule that one charged with a possessory offense has had personal Fourth Amendment rights violated by the illegal search that discovered the contraband becomes crucial because that assumption links the Fourth Amendment and possession in a way that makes prosecutorial self-contradiction the only possible support for the 'automatic standing' rule." *United States v. Hunter, supra* at 1073-1074.

the constitutional issue will be reached.

When the prosecution's entire case - the offense charged, the theory of the offense, and the supporting evidence - ultimately depend on the defendant's possession, as construed under the applicable penal law, of the evidence seized during the challenged search, it is difficult to conceive a persuasive and compelling argument to justify providing the state with the prerogative of denying at a suppression hearing that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *See Rakas v. Illinois, supra* at 140.

The requirement of "automatic" standing to alleviate "the vice of prosecutorial self-contradiction" is in no way predicated upon the principles of a "target" theory of standing.[16] "Automatic" standing does not depend on nor require a determination that the defendant was the "target" of the search. To the contrary, the very nature of the charge and the prosecution's theory of the case trigger the applicability of the "automatic" standing rule. Consequently, "the substantial administrative difficulties" and "practical difficulties" which would necessarily attend a "target" theory of standing are not present under "automatic" standing. *See Rakas v. Illinois, supra* at 136-137.

The doctrine of "automatic" standing, an exception to the general precept that Fourth Amendment rights cannot be asserted vicariously, "is designed to fight the '"vice of prosecutorial self-contradiction,"' by preventing the government from adopting the antithetical positions of charging possession as an element of a crime while denying that there was sufficient possession to entitle the accused to challenge the legality of the search by which the evidence was

[16]This Court has expressly rejected the "target" theory of standing. *Rakas v. Illinois, supra* at 133-138.

secured." *United States v. Reyes,* 595 F.2d 275, 279 (5th Cir. 1979), citing *United States v. Oates,* 560 F.2d 45, 53 (2nd Cir. 1977). *See United States v. Cobb,* 432 F.2d 716, 722 (4th Cir. 1970); *United States v. Boston,* 510 F.2d 35, 37-38 (9th Cir. 1974).

Even assuming *arguendo* that *Simmons* completely eliminated the dilemma of self-incrimination, the "vice of prosecutorial self-contradiction" and its corollary result - "the injustice of an internally inconsistent conviction" - would nevertheless mandate the continued adherence to the doctrine of "automatic" standing.

B. PETITIONER WAS ENTITLED TO ACTUAL STANDING TO CONTEST THE SEARCH OF VANESSA COX'S PURSE BECAUSE HE CLAIMED OWNERSHIP OF THE SEIZED PROPERTY.

Assuming *arguendo* that petitioner was not entitled to "automatic" standing to contest the search and seizure at bar, he still met his burden of establishing actual standing due to his admission of ownership of the drugs seized from Ms. Cox's purse both at the time of the search and later at the suppression hearing (T.E., pp. 28-29, 31, 47, 100-101, 149-150; T.S.H (I), p. 9; T.S.H. (II), pp. 3-4, 20; App., pp. 34, 42-43, 51-52).

This Court has repeatedly acknowledged the constitutional tenet that an actual ownership or possessory interest in that which was seized confers standing to challenge the search and seizure.

Jones noted that a defendant moving to suppress evidence obtained as a result of an alleged illegal search and seizure could satisfy "the conventional standing requirement" by

claiming, *inter alia,* "to have owned or possessed the seized property." *Jones v. United States, supra* at 261.

In *Simmons v. United States,* 390 U.S. 377 (1968), a prosecution for a non-possessory offense, a suitcase containing evidence incriminating the defendant was found in the basement of a house belonging to another. On motion to suppress the defendant testified that the suitcase was his. This Court recognized that, "[u]nder the standing rules set out in *Jones,* there will be occasions, even in prosecutions for nonpossessory offenses, when a defendant's testimony will be needed to establish standing." *Simmons v. United States, supra* at 390. "The only, or at least the most natural way in which [the defendant in *Simmons*] could found standing to object to the admission of the suitcase was to testify that he was its owner." *Id.* at 391. "Thus, his testimony is to be regarded as an integral part of his Fourth Amendment exclusion claim." *Id.*

In *Mancusi v. DeForte,* 392 U.S. 364, 367 (1968), confronted with the question of "whether DeForte [had] Fourth Amendment standing to object to the seizure of the records," this Court immediately focused on the defendant's interest in the seized property. After noting that "[t]he papers which were seized . . . belonged not to DeForte but to the Union," this Court concluded that the defendant could, therefore, "have personal standing only if, as to him, the search violated" his interest in the premises searched. *Id.*

In *Combs v. United States,* 408 U.S. 224 (1972), "where the property sought to be suppressed had been stolen and was seized from the farm of [the] defendant's father, and defendant neither lived there nor was present at the time of the search, [this] Court remanded for a standing determination, thereby intimating that one would have a privacy interest in stolen goods sufficient to confer standing." 3

LaFave, Search and Seizure, *supra*, §11.3, p. 559.

Again in 1973, this Court reiterated that "[u]nder the *Simmons* doctrine the defendant is permitted to establish the requisite standing by claiming 'possession' of incriminating evidence." *Brown v. United States*, 411 U.S. 223 (1973). To illustrate this point, this Court suggested that the defendants in *Brown* "could have asserted, at the pretrial suppression hearing, a possessory interest" in the evidence seized to establish standing. *Id.* at 228.

Recently in *Rakas v. Illinois, supra*, this Court reconsidered the portion of the *Jones* decision which dealt with standing based on an interest in the premises searched and the principles that should control such cases. However, the substance of the opinion reaffirmed the principle recognized in *Jones* that a possessory or ownership interest in the evidence seized confers actual standing. *United States v. Mazzelli*, 595 F.2d 1157, 1160 (9th Cir. 1979).

For example, in *Rakas* this Court initially emphasized the failure of the defendants to assert a claim of ownership over the items seized. *Rakas v. Illinois, supra* at 130-131 n.1. This comment implicitly recognizes that a possessory interest in the seized evidence confers standing to challenge the search and seizure. Later in the decision, after asserting that a "casual visitor" to the premises should not be able to contest the impropriety of the search, this Court added that "[t]his is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search. *Rakas v. Illinois, supra* at 142 n.11.

Finally, in holding that the defendants' claim in *Rakas* must fail, this Court stressed that "[t]hey asserted neither a property nor a possessory interest in the automobile, *nor an interest in the property seized.*" *Rakas v. Illinois, supra* at

148 (emphasis added).

The *Rakas* opinion repeatedly endorses the proposition that actual standing is established by a possessory or ownership interest in the property seized.

Although the Supreme Court of Kentucky in the case at bar did not explicitly speak to the concept of actual standing created by a possessory interest in the property seized, the court below did acknowledge petitioner's "admitted ownership of the drugs," but concluded that petitioner had "not made a sufficient showing that his legitimate or reasonable expectations of privacy were violated." *Rawlings v. Commonwealth, supra* at 349, 350. This holding, however, implicitly denies that a possessory or ownership interest in the items seized from the person or premises of another will confer actual standing. Expressed in the language of *Rakas*, the holding below inferentially presumes that a possessory or ownership interest in seized property is not "an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois, supra* at 140.

There can be no doubt, either historically or analytically, that the Fourth Amendment was designed to protect against governmental infringement of an actual ownership or possessory interest in the property seized, even when the seizure occurred during a search of the person or premises of a third party.

This conclusion is not undermined by the oft quoted precept that "[a] person who is aggrieved by an illegal search and seizure *only* through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Rakas v. Illinois, supra* at 134 (emphasis added), citing *Alderman v. United States*, 394 U.S. 165, 174 (1969). The distinction is that when a person has an

actual ownership or possessory interest in the seized property, he is not only aggrieved by the introduction at trial of the evidence seized from the third person, he is also aggrieved by the government's infringement of his actual possessory interest in the property seized, an interest protected by the Fourth Amendment.

"An individual's right to privacy from governmental intrusion into his personal effects does not require that he have physical control of the property." Gutterman, "A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition, 23 Emory L.J. 111, 119 (1974). "He can reasonably expect that his lawfully possessed 'effects' will remain undisturbed upon premises where they have been lawfully placed or in the custody of a third party to whom they are lawfully entrusted." *Id.*

The key factor in this "standing" analysis is that the defendant must demonstrate an *actual* ownership or possessory interest in the property seized. In certain instances, the decision to deny a defendant entitlement to challenge the search and seizure is in reality based not upon a rejection of the principle that an interest in the seized property confers standing, but upon a determination that the alleged possessory or ownership interest was non-existent at the time of the contested search and seizure. *See, e.g., United States v. Wilson,* 536 F.2d 883, 885 (9th Cir. 1976), *cert. denied,* 429 U.S. 982 (1976); *United States v. Archbold-Newball,* 554 F.2d 665, 677-679 (5th Cir. 1977), *cert. denied,* 434 U.S. 1000 (1977). For example, proof that the seized property had been sold or abandoned by the defendant prior to the contested search and seizure would defeat his claim that he had at the time of the search an actual ownership or possessory interest in the seized property protected by the Fourth Amendment.

In the instant case the evidence presented at the pretrial suppression hearings clearly indicated that petitioner maintained ownership of the drugs in question even though he placed those drugs in Vanessa Cox's purse prior to the contested search and seizure (T.S.H. (I), pp. 6-9, 11-12; T.S.H. (II), pp. 3-7, 20; App., pp. 32-35, 42-44, 51). In fact, the prosecution's theory of the case as presented at trial was that at the time of the search Vanessa Cox possessed the drugs in her purse at petitioner's request and that at no time prior to the search had petitioner relinquished his ownership of the drugs (T.E., pp. 12-15, 23-24, 28-29, 31, 47, 100-101, 149-150).

Petitioner's actual ownership or possessory interest in the seized drugs clearly entitled him to contest the legality of the search of Vanessa Cox's purse.

Despite this Court's repeated endorsements of the principle that a possessory or ownership interest in the evidence seized confers actual standing, various federal courts have expressly held that a defendant's possessory interest in items seized does not entitle him to contest the search of another's premises or property. *See United States v. Jackson,* 585 F.2d 653, 656-659 (4th Cir. 1978); *United States v. Smith,* 550 F.2d 277, 283 (5th Cir. 1977), *cert. denied,* 434 U.S. 841 (1977); *United States v. Hunter,* 550 F.2d 1066, 1074-1075 (6th Cir. 1977); *United States v. Galante,* 547 F.2d 733, 739 (2nd Cir. 1976), *cert. denied,* 431 U.S. 969 (1977); *United States v. Lisk,* 522 F.2d 228, 230-231 (7th Cir. 1975), *cert. denied,* 423 U.S. 1078 (1976).

In a representative decision, *United States v. Lisk, supra,* the defendant had placed a bomb in the trunk of an automobile belonging to Hunt and had told Hunt to keep the bomb until the defendant requested its return. Five days later

the bomb was seized from the trunk of Hunt's car by the police. The defendant contended that he had a property interest in the bomb which established his entitlement to contest the search of Hunt's car and the seizure of the bomb. *Id.* at 229-231.

In denying the defendant standing to contest the legality of the search of the vehicle, the *Lisk* court initially propounded the following analysis:

> There is a difference between a search and a seizure. A search involves an invasion of privacy; a seizure is a taking of property. The owner of a chattel which has been seized certainly has standing to seek its return. It does not necessarily follow that he may also object to its use as evidence. *Id.* at 230.[17]

Employing this analysis, *Lisk* reasoned that any violation of the Fourth Amendment generated by the search of Hunt's car "is clearly not available to the defendant as a basis for suppressing evidence acquired thereby." *Id.* However, due

[17]In 1951 in *United States v. Jeffers,* 342 U.S. 48, 52 (1951), this Court specifically rejected a government theory which proposed, as does *Lisk,* that a search and seizure may be severed into separate components to facilitate analysis of the Fourth Amendment standing questions. The government argued in *Jeffers* that "the search did not invade [the defendant's] privacy and that he, therefore, lacked the necessary standing to suppress the evidence seized." *United States v. Jeffers, supra* at 52. In response to the government contention that "[t]he significant act" was "the seizure of the goods of the [defendant] without a warrant," this Court explained that it did "not believe the events are so isolable." *Id.* "Rather [the search and seizure] are bound together by one sole purpose - to locate and seize the narcotics of [the defendant]." *Id.* "The search and seizure are, therefore, incapable of being untied." *Id.* In anticipatorily disposing of the analytical underpinnings of the *Lisk* decision, this Court in *Jeffers* emphasized that "[t]o hold that this search and seizure were lawful as to the [defendant] would permit a quibbling distinction to overturn a principle which was designed to protect a fundamental right." *United States v. Jeffers, supra* at 52.

to the defendant's "ownership of the bomb," the "defendant has standing to object to the seizure, but no standing to object to the search." *Id.* at 230-231. Under this theory, the "[d]efendant must relay on the seizure of the [bomb] as a violation of his own Fourth Amendment rights" and the legality of that seizure must be evaluated "as though the [bomb] had been found in a public place and then seized." *Id.* at 230. Then, "[i]f the seizure was lawful, the evidence is admissible against [the] defendant." *Id.*

The *Lisk* opinion and its progeny misperceive the nature of the privacy interest created by an actual ownership or possessory interest in the item seized. "*Lisk* has been properly criticized for failing to take account of the privacy expectation which attends a bailment relationship." 3 LaFave, Search and Seizure, *supra,* §11.3, p. 560. The decision in *Lisk* "should have discussed in greater detail the reasonableness of the defendant's expectation that the car's trunk would be free from governmental intrusion." Note, 64 Geo. L.J. 1187, 1195-1196 (1976). "The better view, therefore, is that there is standing pursuant to a bailment arrangement because the bailor has 'sought to maintain the security and privacy of his possession' in a place 'he regarded . . . as a safe place for storage.' " 3 LaFave, Search and Seizure, *supra,* §11.3, p. 561, citing Note, 64 Geo. L.J. 1187, 1196 (1976).

By holding that an ownership or possessory interest in the item seized confers standing to contest only the seizure, the *Lisk* decision becomes an ineffectual methodology for evaluating "whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Rakas v. Illinois, supra* at 140. For example, if a defendant hides his gun in a neighbor's house without the neighbor's consent and the

police search the neighbor's residence illegally, the defendant should be able to challenge the seizure of the gun but not the search of the house because he had no cognizable Fourth Amendment interest in the neighbor's premises. *See* Knox, Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures, 40 Mo.L.Rev. 1, 52 (1975). If, on the other hand, the neighbor consented to the defendant hiding the weapon in the neighbor's house, the defendant "would then have a right to privacy and could contest a search which resulted in the seizure of [the] gun." *Id.*

Under *Lisk*, however, the defendant in each of the scenarios would be denied the opportunity to challenge the legality of the search which resulted in the seizure of his gun on the theory that the search could not possibly have violated any Fourth Amendment interest of the defendant.

In the instant case the evidence seized as a result of the search of Vanessa Cox's purse included contraband drugs. Although the Supreme Court of Kentucky in its opinion below made no reference to the contraband nature of the seized drugs in deciding the issue of petitioner's entitlement to contest the search and seizure, comment on this point is warranted because of the frequent contention of the prosecution that the Fourth Amendment was not designed to protect against governmental infringement of a possessory or ownership interest in contraband. *See United States v. Galante, supra* at 739; *United States v. Sacco,* 436 F.2d 780, 784 (2nd Cir. 1971).

In *United States v. Jeffers,* 342 U.S. 48, 52 (1951), the contention was raised that "no property rights within the meaning of the Fourth Amendment exist in [seized] narcotics . . . because they are contraband in which Congress [had] declared that 'no property rights shall exist.'"

Dismissing that argument, this Court in *Jeffers* explained that, even when "the evidence illegally seized [is] contraband," it is nevertheless the defendant's "property, for purpose of the exclusionary rule" and he is "entitled on motion to have it suppressed as evidence on his trial." *United States v. Jeffers, supra* at 54. *See Combs v. United States, supra.*

A determination of the contraband nature of the property seized is an artificial factor for evaluating whether a defendant has a cognizable Fourth Amendment interest in the evidence seized from a third party.

When the question is discussed "[i]n expectation-of-privacy terms . . . it is difficult to see how it can be concluded that if A is permitted to leave certain effects on B's property, his reasonable expectations as to the security of that place from police intrusion are somehow affected by the [contraband] nature of those effects." 3 LaFave, Search and Seizure, *supra,* §11.3, p. 559.

The fallacy of the argument that a defendant has no right to base standing on possession or ownership of contraband property is based on the failure to appreciate the distinction between a person's inability to assert his "wrongful" presence at a place as "a substantial possessory interest in the premises searched" and his right to assert that his ownership or possessory interest in the seized property, albeit contrabnd, conferred upon him a sufficient interest in the person or premises of another to merit Fourth Amendment protection.

If the touchstone for ascertaining whether a Fourth Amendment interest has been violated is the nature of the seized property, *e.g.,* contraband drugs, rather than the nature of a person's interest in that property, then the determination of standing to contest an alleged illegal search

and seizure will be expanded in many instances into a miniature replica of the trial on the merits. For example, if the defendant alleges a possessory or ownership interest in the seized drugs, the prosecution to defeat his claim will be required to prove with competent evidence that the drugs in question are actually contraband under the penal statutes of the jurisdiction. Undoubtedly this will require the prosecution to present at the suppression hearing expert witnesses to establish the identity of the seized substance. Of course, if the defendant could establish that he owned the drugs without knowledge of their contraband nature or that he possessed them pursuant to a valid prescription, this type of evidence would seemingly revive a cognizable Fourth Amendment interest in the seized property. Obviously such a methodology for making the initial determination of whether a person is entitled to contest the legality of a particular search and seizure is fraught with "very substantial administrative difficulties" and the necessity of "lengthy hearings." *See Rakas v. Illinois, supra* at 136-137.[18]

In the instant case the evidence revealed that, prior to the initial arrival of the police at the Marquess' residence,

[18]The difficulties in such an approach are legion. Assume a defendant is charged with possession of a stolen pistol and murder. The pistol was seized from a third party to whom the defendant had entrusted it for safekeeping. The only evidence which links the defendant to the murder is the seized pistol which, according to ballistics experts, is the murder weapon. When the defendant moves to suppress the pistol as the product of an illegal search and seizure, the trial judge on the basis of prosecution evidence that the weapon is stolen property decides that the defendant has no standing to contest the search because he can have no legitimate possessory interest in stolen property. At trial the jury finds the defendant not guilty of possession of the stolen gun, but on the basis of the defendant's possessory interest in the pistol convicts him of murder. Under such circumstances, "the injustice of an internally inconsistent conviction" is apparent. *See Jones v. United States, supra* at 264.

petitioner had placed the drugs and an address book in Vanessa Cox's purse (T.E., pp. 12-15, 23-24, 35, 100; T.S.H. (II), pp. 3-4, 20; App., pp. 35, 42-43, 51-52). When Ms. Cox in compliance with a police order emptied her purse, the drugs and an address book were revealed (T.E., pp. 13, 16-17, 19, 28, 45-46, 47, 50-51, 149, 155; T.S.H. (I), p. 8; App., p. 33). During the course of the trial the drugs and the notebook were introduced into evidence (T.E., pp. 157-159).

These facts demonstrate that petitioner had an actual possessory or ownership interest in the address book which was seized as a result of the search of Ms. Cox's purse. Obviously, petitioner's address book may not be characterized as either contraband or, under the record at bar, stolen property. Consequently, petitioner need not premise his actual standing on a possessory interest in contraband. However, this factual situation illustrates the deficiencies which inhere in denying a cognizable Fourth Amendment interest in the property seized simply because of its nature. When, as in the instant case, a defendant entrusts various items to another person for safekeeping, does the contraband nature of some, but not all, of the items deny the defendant a right to contest the illegality of the search that results in the seizure of all the property? On the other hand, does the existence of at least one item of noncontraband nature confer on the defendant an entitlement to challenge the search of the third party and to seek suppression of all the seized evidence whether contraband or not?

The contention that the contraband nature of the property seized negates a Fourth Amendment interest is in conceptualization strikingly similar to the waiver arguments rejected in *Michigan v. Tyler,* ____ U.S. ____ , 98 S. Ct. 1942, 1948 (1978), and *Mincey v. Arizona,* ____ U.S. ____

, 98 S. Ct. 2408, 2413 (1978). "[T]his reasoning would impermissibly convict the suspect even before the evidence against him was gathered." *Mincey v. Arizona, supra,* 98 S. Ct. at 2413. "[A] conviction cannot be used *ex post facto* to validate the introduction of evidence used to secure that same conviction." *Michigan v. Tyler, supra,* 98 S. Ct. at 1948.

Because the concept of standing generated by an actual possessory or ownership interest in the property seized from the person or premises of a third party remains constitutionally viable, petitioner on the basis of his admitted ownership of the drugs seized from Ms. Cox's purse was entitled to contest the illegality of that search and seizure.

C. PETITIONER WAS ENTITLED TO CONTEST THE SEARCH OF VANESSA COX'S PURSE BECAUSE THAT SEARCH VIOLATED HIS REASONABLE EXPECTATION OF PRIVACY.

In its opinion below the Kentucky Supreme Court concluded "that the search of Vanessa Cox's purse did not violate [petitioner's] legitimate or reasonable expectation of freedom from governmental intrusion." *Rawlings v. Commonwealth, supra* at 350.

The Kentucky Supreme Court observed that, "[f]or what it is worth, [petitioner] testified at the suppression hearing that when he placed the drugs in Vanessa Cox's purse, he did not expect or feel that the purse would be free from the intrusion of the officers." *Id.*[19]

[19]During the defense examination of petitioner at the suppression hearing, one of petitioner's counsel asked: "Do [sic] you expect that Vanessa Cox's purse would be free from intrusion by these officers as

(continued)

The majority opinion in *Rawlings* reasoned that "[t]here is a factor of the risk that Vanessa Cox might consent to a search of her purse together with the always present possibility of inadvertent exposure of the drugs." *Id.* "Considering the totality of the circumstances," the Kentucky Supreme Court held "the search did not violate [petitioner's] legitimate or reasonable expectations of freedom from governmental intrusion into the purse" and that there was not "a sufficient showing that [petitioner's]

(footnote continued from preceding page)

you sat there?" (T.S.H. (II), p. 13; App., p. 48). At that point, the prosecutor objected, claiming that defense counsel was "calling for a legal conclusion" (T.S.H. (II), p. 13; App., p. 48). The trial judge announced his ruling with a strict qualification:

> He [petitioner] can answer it, but you are right about that. What he [petitioner] thought or didn't think or what he now says he thinks doesn't have anything to do with it (T.S.H. (II), p. 14; App., p. 48).

The defense counsel then rephrased the question and the following colloquy occurred:

> Q72 Did you feel that Vanessa Cox's purse would be free from the intrusion of the officers as you sat there? When you put the pills in her purse, did you feel that they would be free from governmental intrusion?
>
> Q No sir (T.S.H. (II), p. 14; App., p. 48).

At the conclusion of this examination, petitioner was asked "if he expected the purse to be private" and he answered in the affirmative (T.S.H. (II), p. 15; App., p. 49).

Petitioner and the prosecutor at the inception of cross-examination engaged in the following exchange:

> Q1 Did you consider that purse to be private for your personal possessions, Mr. Ralings[sic]?
>
> A Well, I didn't expect her to go telling everybody (T.S.H. (II), p. 15; App., p. 49).

Moments later petitioner testified that the "purpose for putting all these [drugs] in [Ms. Cox's purse] purse" was because he "didn't want them to be seen" (T.S.H. (II), pp. 16-17; App., pp. 49-50).

legitimate or reasonable expectations of privacy were violated." *Id.*

To determine whether the proponent of a motion to suppress is entitled to contest the legality of a search and seizure, "the question is whether the challenged search or seizure violated the Fourth Amendment rights of a criminal defendant who seeks to exclude the evidence obtained during it." *Rakas v. Illinois, supra* at 140. "That inquiry in turn requires a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." *Id.*

"[T]he capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Rakas v. Illinois, supra* at 143, citing *Katz v. United States,* 389 U.S. 347, 353 (1967).

In the instant case petitioner "took normal precautions to maintain his privacy." *Rakas v. Illinois, supra* at 152 (Powell, J., concurring). Petitioner placed various items including the drugs in Ms. Cox's purse; this was done with her knowledge.

A defendant "has standing to attack the search of [another's] suitcase only if he had a reasonable expectation of privacy with respect to that [suit] case." *United States v. Wilson,* 536 F.2d 883, 885 (9th Cir. 1976). A defendant's "expectation [of privacy] perhaps could be implied if he had entrusted his belongings to [another] for storage in [the other's] bag." *Id.* at 885, citing *Mancusi v. DeForte, supra* at 368-370.

As explained above, petitioner's ownership or possessory interest in the items he placed in Ms. Cox's purse created a

legitimate expectation of privacy. Gutterman, "A Person Aggrieved," *supra* at 119. It must be remembered that this Court "has not altogether abandoned use of property concepts in determining the privacy interests protected by [the Fourth] Amendment." *Rakas v. Illinois, supra* at 144 n.12.

The dissenting justice in *Rawlings* correctly observed, petitioner "was entitled to expect that governmental officials would intrude into the purse only with consent or by complying with the Fourth Amendment." *Rawlings v. Commonwealth, supra* at 352. Of course, as the majority below notes, petitioner had to be aware of the risk that Ms. Cox "might consent to a search of her purse" or that the drugs might be revealed through "inadvertent exposure." *Id.* at 350. Despite these two potential risks to petitioner's expectation of privacy in Ms. Cox's purse, it is obvious that it was not unreasonable for petitioner to expect that the items he entrusted to Ms. Cox for storage and even transportation in her purse would remain private to the rest of the world. This "expectation of privacy" was "more than a subjective expectation of not [having the items] discovered," it was an "expectation" that "society is prepared to recognize as 'reasonable.'" *Rakas v. Illinois, supra* at 143-144 n.12, citing *Katz v. United States, supra* at 361 (Harlan, J., concurring).

This Court in *Rakas* recognized that even under a "legitimate expectation of privacy" test to determine a defendant's entitlement to challenge the legality of a search and seizure "the inquiry . . . is the same" as was previously utilized under the "concept of standing." Consequently, the preceding analysis and argumentation developed above on the question of "automatic" and actual standing amply demonstrate petitioner's entitlement to contest on the merits

the constitutionality of the search of Vanessa Cox's purse and the attendant seizure of his property found in the purse. *Rakas v. Illinois, supra* at 139.

In the final analysis petitioner was constitutionally entitled to contest the legality of the search of Ms. Cox's purse on three distinct, but "invariably intertwined concepts" - the "automatic" standing rule, standing generated by an actual possessory or ownership interest in the property seized, and a "reasonable and legitimate expectation of privacy." All three of these methdologies function to demonstrate that the police search of Ms. Cox's purse and the seizure of petitioner's personal property "infringed an interest of [the petitioner] which the Fourth Amendment was designed to protect." *Rakas v. Illinois, supra* at 140.

II.

THE SEARCHES AND SEIZURES WHICH PRODUCED THE CONTRABAND DRUGS AND OTHER INCRIMINATING EVIDENCE WERE THE FRUITS OF THE UNCONSTITUTIONAL ARRESTS OF BOTH PETITIONER AND VANESSA COX IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

The searches of both Vanessa Cox and petitioner, the seizure of evidence from both parties, and the statements by both parties incriminating petitioner were the fruits of the unlawful arrests of Ms. Cox and petitioner and, consequently, must be suppressed. *Dunaway v. New York,* ____ U.S. ____ , 98 S. Ct. 2248 (1979); *Wong Sun v. United*

States, 371 U.S. 481 (1963); *United States v. Ceccolini,* ____ U.S. ____ , 98 S. Ct. 1054, 1060 (1978); *Brown v. Illinois,* 422 U.S. 590 (1975).

Petitioner's right to challenge the illegality of the detention of Ms. Cox and its taint of the subsequent search of her purse and her statements to the police is predicated on petitioner's entitlement to contest the illegality of the search of her purse and the seizure of drugs he owned from that purse (see Argument I, *supra*).

Regardless of whether petitioner is entitled to challenge the detention of Ms. Cox and the ensuing search of her person and effects, he is clearly entitled to raise the constitutional impropriety of his own detention and the effect of that detention on both the search of his person and his self-incriminating statements obtained during the unlawful detention.

Police officers, armed with a warrant for the arrest of Lawrence Marquess, forcibly entered his residence. During the course of the search of the residence for Marquess, the officers noted the odor of burned marijuana in the house[20] and in Lawrence Marquess' bedroom observed on a mantel what appeared to be marijuana seeds.[21] The police officers

---

[20]"When [he] first entered the house," Detective Railey "smelled [marijuana smoke] and [he] smelled it on into the living room" and in "Mr. Sadler's bedroom [which] was kind of between the living room and the entrance" (T.S.H. (I), p. 4; App., p. 31). At trial Detective Railey testfied that "[u]pon entering the residence" he "smelled smoke, marijuana smoke in the air in the entrance way . . . and through the bedroom and . . . in the living room area" (T.E., pp. 133-134). Detective Railey added that he "smell[ed] marijuana [smoke] in the whole house" (T.E., p. 135).

[21]"As [he] came back through one of the bedroomns," Detective Railey "noticed what looked like some seeds laying on a mantel in one of the bedrooms" (T.S.H. (I), pp. 4-5; App., p. 31). At trial Detrective Railey testified that he "saw what appeared to be some marijuana seeds laying on the mantle" in the bedroom of Lawrence Marquess (T.E., p. 134).

then decided that a search warrant for the house was needed and two of the officers departed to procure the warrant.

During the forty-five minute wait for the two officers to secure the search warrant, the five individuals present, including petitioner, were detained in the living room and were informed by the officers that they could not leave the room or the premises unless they consented to a search of their person.[22] Two of the individuals were permitted to leave after submitting to a search.

In his dissenting opinion in petitioner's case, Justice Lukowsky of the Kentucky Supreme Court reasoned that "[t]he searches and seizures which occurred were the fruits of unlawful arrests and should be suppressed." *Rawlings v. Commonwealth, supra* at 350, citing *Wong Sun v. United States, supra.* Justice Lukowsky contended that the conduct of the police officers who "would not allow those present to leave the room or the premises unless they would submit to a search . . . constituted an arrest because it significantly deprived those individuals of their freedom of action." *Rawlings v. Commonwealth, supra* at 350, citing *Terry v. Ohio, supra.* The dissenting justice added that this "was not

[22]At the initial suppression hearing Detective Railey testified that "apparently the other police officers told [the people present at the Marquess residence] they had to stay until [he and another officer] got back" with the search warrant (T.S.H. (I), p. 14; App., p. 36). It was Detective Railey's "understanding" that "if every individudal would consent to a search of their person, they would be [allowed] to leave" the Marquess residence, and "if not, they would have to wait for [the officers] to return" (T.S.H. (I), p. 14; App., p. 36).

Petitioner testified at the second suppression hearing that he was required to sit in the living room while the officers went to procure a search warrant (T.S.H. (II), pp. 8-9; App., p. 45). When petitioner "asked if [he] could leave" and repeatedly inquired "why [he] was being held there, two police officers came back into the room and said, 'if you all will consent to a bodily search, you can leave' " (T.S.H. (II), p. 10; App., p. 46).

an investigatory stop but an arrest because the detention here went well beyond the bounds of permissible investigatory stops." *Rawlings v. Commonwealth, supra* at 350. However, the Kentucky Supreme Court in its majority opinion below "disregarded as irrelevant the detention during the period in which the officers were procuring a search warrant." *Rawlings v. Commonwealth, supra* at 350.[23]

There can be little doubt that petitioner, Vanessa Cox, and the three other people present were "seized" when they were told by the police that they must remain at the Marquess residence unless they "consented" to a search of their persons and effects. "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." *Terry v. Ohio, supra* at 16, cited with approval in *Dunaway v. New York, supra,* 99 S. Ct. at 2253 n.6.

According to Vanessa Cox - a prosecution witness, she, petitioner, and the other three persons present "were detained on the couch" (T.E., p. 25). She explained that petitioner "got up to get a drink of water, and [the police] told him to sit back down" because "no one [was allowed to] move anywhere" (T.E., pp. 25-26, 38). After approximately "ten or fifteen minutes," the police "said that if [Ms. Cox and the others] would consent to a search of [their] persons and possessions," they could leave "if [they] were not residents of the household" (T.E., pp. 26, 40). The other three persons present at the time - Dennis Saddler, Keith Northern, and Linda Braden - corroborated Ms. Cox's explanation of the detention (T.E., pp. 111, 192, 195).

[23]The decision of the Kentucky Supreme Court in the instant case was rendered on May 1, 1979 and the mandate issued on May 22, 1979. This Court decided *Dunaway v. New York, supra,* on June 5, 1979.

Detective Bivens acknowledged at trial that he "was instructed to keep [all] occupants of the house in one room in the living room of the house to watch all of them until they returned with a search warrant" (T.E., p. 153). According to Detective Railey's trial testimony, petitioner and the others were "being held for investigation" (T.E., p. 171).

Ms. Cox indicated on redirect examination that she "would have left on foot if [she] had not been detained" (T.E., p. 59).

Recently in *Dunaway v. New York*, this Court concluded that the police "violated the Fourth and Fourteenth Amendments when, without probable cause to arrest, they took [the defendant] into custody, transported him to the police station and detained him there for interrogation." *Id.*, 99 S. Ct. at 2253, 2258.

Citing to *Davis v. Mississippi*, 394 U.S. 721 (1969), and *Brown v. Illinois*, 422 U.S. 590 (1975), this Court in *Dunaway* concluded that "detention for custodial interrogation - regardless of its label - intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." *Dunaway v. United States, supra*, 99 S. Ct. at 2258.

In all but certain "narrowly defined intrusions,"[24] this

[24]*Terry v. Ohio, supra* (a brief, on-the-spot stop on the street and a frisk for weapons); *Adams v. Williams*, 407 U.S. 143 (1972) (frisk for weapons on basis of reasonable suspicion); *Pennsylvania v. Mimms*, 434 U.S. 196 (1977) (order to get out of car is permissible "de minimis" intrusion after car is lawfully detained for traffic violations; frisk for weapons justified after "bulge" observed in jacket); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (brief investigative stop of automobiles by roving border patrols to check for illegal immigrants); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (fixed checkpoint to stop and check vehicles for aliens); *Delaware v. Prouse*, ____ U.S. ____, 99 S. Ct. 139 (1979) (random checks for drivers' licenses not permitted on less than articulable reasonable suspicion). *See Dunaway v. New York, supra*, 99 S. Ct. at 2255-2256.

Court has emphatically demanded adherence to "the principle that seizures are 'reasonable' only if supported by probable cause." *Dunaway v. New York, supra*, 99 S. Ct. at 2257.

"The application of the Fourth Amendment's requirement of probable cause does not depend on whether an intrusion of this magnitude is termed an " 'arrest' under state law." *Dunaway v. New York, supra*, 99 S. Ct. at 2256. "To argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment." *Davis v. Mississippi*, 394 U.S. 721, 762 (1969). "Investigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention." *Id.* "Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.' " *Id.* at 726-727.

The warrantless arrest/detention of petitioner and the other people present at the Marquess residence was unconstitutional because it was not supported by probable cause to arrest.[25]

"Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Michigan v. DeFillippo*, ____ U.S. ____, 99 S. Ct. 2627,

[25]"Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed [by the person to be arrested]." *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949), quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925), cited with approval in *Dunaway v. New York, supra*, 99 S.Ct. at 2254 n.9.

2631 (1979), citing *Ker v. California,* 374 U.S. 23, 37 (1963), and *Johnson v. United States,* 333 U.S. 10, 15 and n.5 (1948).

Under Kentucky law a police officer may make an arrest without a warrant for a misdemeanor only when the offense is committed in his presence. KRS 431.005(1).[26] In Kentucky the first offense of possession of marijuana for sale is a misdemeanor. KRS 218A.990(4).[27] Similarly, the possession of marijuana for personal use is also a misdemeanor. KRS 218A.990(7).[28]

"The facts that the police officers smelled the odor of burnt marijuana and inadvertently discovered a few marijuana seeds in 'plain view' in Marquess' room created probable cause for the police officers to obtain a search warrant for the premises, but did not establish that a

[26]KRS 431.005(1) provides that "[a] peace officer may make an arrest in obedience to a warrant, or without a warrant when a felony or misdemeanor is committed in his presence or when he has reasonable grounds to believe that the person being arrested has committed a felony." The Kentucky "statute governing arrest, KRS 431.005, codifies the common law rule and does not authorize a peace officer to arrest on suspicion of a misdemeanor as it does on suspicion of the commission of a felony, but limits arrest for a misdemeanor to one committed in the presence of the arresting officer." *Johnson v. Commonwealth,* Ky., 443 S.W.2d 20, 22 (1968).

[27]KRS 218.A.990(4) provides that "[a]ny person who knowingly and unlawfully manufactures, sells, or possesses with intent to sell marijuana shall, for the first offense, be confined in the county jail for not more than 1 year or be fined not more than $500, or both." Nothing in the record indicates any basis for a belief that marijuana was being possessed for purpose of sale or that any of the individuals present had been previously convicted of this offense. onsequently, no evidence of record would "provide the police officers with reasonable grounds to believe a felony had been committed by anyone." *Rawlings v. Commonwealth, supra* at 351 n.2 (Lukowsky, J., dissenting).

[28]See note 2, *supra.*

misdemeanor was being committed in their presence by any of the individuals on the premises." *Rawlings v. Commonwealth, supra* at 351 (Lukowsky, J., dissenting). "The odor of burnt marijuana is merely evidence that marijuana has been smoked on the premises at sometime in the past" and "does not establish that marijuana is present on the premises at the time the odor is detected." *Rawlings v. Commonwealth, supra* at 351 (Lukowsky, J., dissenting). "Only the odor of either unburned marijuana or burning marijuana would indicate the actual presence of marijuana on the premises." *Id. See, e.g., People v. Hilber,* 403 Mich. 312, 269 N.W.2d 159 (1978); *State v. Schoendaller,* Mont., 578 P.2d 730 (1978). As Detective Railey candidly admitted, the smell of burned marijuana in the air "is not a violation [of the criminal law] at all" without reference to its source (T.E., p. 172). In fact, Vanessa Cox, a key prosecution witness, testified on direct examination that none of the people present at the residence had smoked marijuana there on the day in question (T.E., p. 33).

Similarly, "[t]he presence of the seeds in Marquess' room did not create probable cause to believe that any of the individuals in the living room possessed marijuana even with the presence of the odor of burnt marijuana." *Rawlings v. Commonwealth, supra* at 351 (Lukowsky, J., dissenting).[29]

[29]The visual recognition of contraband marijuana seeds, *i.e.,* those which are capable of germinating, may not be a relatively simple task. "Depending on the variety, healthy mature seeds (which are botanically achene nuts) vary in size between 1/12 and 1/4 inches in length . . . Seed colors range from a buff through a dark brown, and from light grey to almost black colors. Often seeds are mottled with brown on black spots, bars, or lines on a lighter field. Green or whitish seeds are usually immature and will germinate feebly if at all. Fresh seeds have a waxy glimmer and a hard, intact shell. Shiny, very dark brown or black seeds often mean the contents are fermented and the embryo is dead." Frank & Rosenthal, *Marijuana Grower's Guide* (Berkeley 1978), p. 47.

In the instant case the total absence of individualized probable cause to arrest is demonstrated by the police decision to detain *all* five persons found on the premises. As this Court recently emphasized, "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Ybarra v. Illinois,* ____ U.S. ____, 100 S.Ct. 338, 342 (1979), citing *Sibron v. New York,* 392 U.S. 40, 62-63 (1968).

As the dissenting judge in the decision of the intermediate court below observed, "[i]t requires no citation of authority to note that an officer may arrest an individual when that person commits a misdemeanor in the policeman's presence" (App., p. 71). The dissent then emphasized that "[t]he law enforcement agent must *observe* the offense but more importantly, he must also observe the actor so engaged in the illegal activity" (App., p. 71). In the instant case, according to the dissenter, "absolutely no one was seen doing anything" (App., p. 71).

Under the facts and circumstances of the case at bar, it is undeniable that the police lacked probable cause to arrest either Ms. Cox or petitioner.

The detention of Ms. Cox and petitioner "was in important respects indistinguishable from a traditional arrest." *Dunaway v. New York, supra,* 99 S.Ct. at 2256. All of the persons present were specifically informed by the police that they could not leave the premises unless they would agree to waive a Fourth Amendment right and submit to a search of their person and effects. The period of detention lasted approximtely forty-five minutes during which the detainees were under the personal supervision of some four or five police officers (T.E., p. 41).

Admittedly the police in the instant case did not transport

the five individuals to a police station, however the police did detain Ms. Cox and petitioner in a place which was not their home for approximately forty-five minutes. Certainly the fact that the police seize a person for a substantial period of time without transporting him to a police station would not exempt the police from adhering to the probable cause standard. To permit such an exception would be to encourage police offers to deviate from routine procedures when detaining people on the theory that a seizure divested of the traditional garb of an arrest may be deemed by the courts to be less of a seizure.

While no actual interrogtion occurred prior to the searches, the seizure of Ms. Cox and petitioner are in no way "roughly analogous to the narrowly defined intrusions involved in *Terry* and its progency." *Dunaway v. New York, supra,* 99 S.Ct. at 2256.

Under the facts of the instant case, petitioner, Vanessa Cox, and one other individual were detained for approximately forty-five minutes. The detention was not accomplished as a formal arrest and it was not for the purpose of custodial interrogation. Nevertheless, under the *Dunaway* analysis, this detention of petitioner and the others was an "investigatory seizure" which intruded so severely on the interests protected by the Fourth Amendment that it could be justified only on the basis of probable cause to arrest.

Assuming *arguendo* that this Court concludes that the detention of petitioner was unconstitutional, it is obvious that the search of petitioner's person and the seizure of the knife and money were tainted by this illegal arrest and must be suppressed. *Wong Sun v. United States, supra.*

On the basis of the same primary illegality, petitioner's admissions of ownership of the drugs found in Ms. Cox's

purse must be suppressed. *Brown v. Illinois, supra.* Absent his unlawful detention, petitioner would not have been present to respond to Ms. Cox's indications that the drugs in her purse belonged to him. Although *Miranda* warnings were apparently given to all three individuals before the search of their persons commenced, (T.S.H. (I), pp. 6, 10; T.S.H. (II), p. 11; App., pp. 32, 35, 46; T.E., p. 119), nothing in the record indicates that the police ascertained whether the individuals understood the rights and elected to waive them before questioning began (T.E., pp. 31, 47, 100-101, 149-150; T.S.H. (I), pp. 9, 11-12; App., pp. 34-35).

In view of "[t]he temporal proximity of the arrest and the confession," the absence of "intervening circumstances," and "the purpose and flagrancy of the misconduct," petitioner's confession must be suppressed. *Brown v. Illinois, supra* at 603-604. Petitioner's statements to the police occurred within an hour of his detention and the only intervening event of significance was the police required Ms. Cox to reveal the contents of her purse and to indicate who owned the contraband found in her possession.

Additionally, the detentions of both petitioner and Ms. Cox were, "both in design and execution . . . investigatory." *Brown v. Illinois, supra* at 605. The detention was admittedly for "investigation" purposes (T.E., p. 171). Additionally, the police used the detention as leverage to compel the five individuals to submit to a search of their persons and effects as a condition precedent to being freed from police restraint. *Id. Dunaway v. New York, supra,* 99 S. Ct. at 2259-2260.

Assuming *arguendo* that this Court decides that petitioner is constitutionally entitled to contest the illegality of the search of Ms. Cox's purse and the seizure of the drugs in her

possession (see Argument I, *supra*), it is obvious that under the principles espoused in *Dunaway* the unconstitutional detention would taint the subsequent search of her purse and the seizure of the drugs. *Wong Sun v. United States, supra.* Of course, once the drugs are suppressed, Ms. Cox's references to those items in connection with petitioner's ownership of them must also be suppressed. *Id.*[30]

Petitioner submits that no attenuation analysis for a live witness under *United States v. Ceccolini,* ____ U.S. ____, 98 S. Ct. 1054 (1978), is necessary in this factual context. But, in any event, Ms. Cox's decision to remain silent for forty-five minutes of police detention when she knew that her purse contained a large amount of contraband drugs which belonged to petitioner reveals that her eventual decision to tell the police that the drugs belonged to petitioner was motivated not by a "willingness of the witness to freely testify" but as a direct result of the illegal detention and the accompanying unconstitutional search which revealed contraband in her purse. *United States v. Ceccolini, supra,* 98 S. Ct. at 1060-1061.

As the dissenting justice in the Kentucky Supreme Court explained, "[a]ll evidence discovered [in the case at bar] was a result of this unlawful detention and should be suppressed as 'fruit of the poisonous tree.'" *Rawlings v. Commonwealth, supra* at 351 (Lukowsky, J., dissenting).

---

[30] "If [an] object is inadmissible [under the exclusionary rule], then the [police] officer may not testify concerning the fact of its discovery, nor may others ordinarily give testimony concerning that property when the testiony is made possible only by virtue of the prior illegal seizure." 3 LaFave, Search and Seizure, *supra,* §11.4, p. 667.

III.

THE FOURTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE SEARCH OF VANESSA COX'S PURSE AND THE SEIZURE OF ITS CONTENTS WHEN THAT SEARCH WAS CONDUCTED PURSUANT TO A WARRANT WHICH AUTHORIZED ONLY A SEARCH OF THE PREMISES OF THE RESIDENCE IN WHICH SHE WAS A VISITOR.

In the instant case the police officers detained Ms. Cox, petitioner and, at least initially, three other people for periods of up to forty-five minutes while they sought to secure a warrant to search the premises in question. When the police returned, they had only a warrant to search the premises, yet they prefaced their search of the residence with a search of the three remaining people - Ms. Cox, petitioner and Dennis Saddler.

Assuming *arguendo* that this Court finds that petitioner is constitutionally entitled to challenge the search of Ms. Cox's purse and the attendant seizure of the drugs which were emptied from that purse (see Argument I, *supra*), then the warrantless search of Ms. Cox's purse was unconstitutional and the evidence seized from within must be suppressed since no exigent circumstances existed.

"[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona,* ____ U.S. ____, 98 S. Ct. 2408, 2414 (1978).

Because the Kentucky Supreme Court in the instant case

held that petitioner lacked standing to contest the merits of the search of Ms. Cox's purse, that court did not reach the issue at bar. Nevertheless, the Kentucky Supreme Court observed that "the officers returned with a search warrant, authorizing a search of the premises," but "[t]here was no authority for the search of individuals on the premises." *Rawlings v. Commonwealth, supra* at 349.[31]

Similarly, the intermediate appellate court below in the instant case noted that "the departed officers returned with a search warrant for the premises," but "[t]he warrant did not authorize a search of individuals on the premises" (App., p. 61-62).

At the initial suppression hearing Detective Railey justified his search of the persons present on the basis that when he read the search warrant to the three people present and advised them of their rights, he felt that "some of them might have fear of being arrested" (T.S.H. (I), p. 6; App., p. 32). He made his "protective search" of their persons and effects because he believed the search warrant "gave [the three individuals] cause to be alarmed" (T.S.H. (I), p. 10; App., p. 34). Amplifying on this theory, Detective Railey explained that if, pursuant to the search warrant, the police found any narcotics in the house, these people "would be arrested" (T.S.H. (I), p. 15; App., p. 37). For this reason, Detective Railey "felt at that time that [these three people] were or could be a danger" (T.S.H. (I), p. 15; App., p. 37). Detective Railey "always search[es] everyone [he] arrest[s] or prior to

[31]The dissenting justice in the Kentucky Supreme Court remarked that, "[a]lthough not articulated in the majority opinion, it must be assumed from its tenor that if Cox had been challenging the validity of the search instead of [petitioner] the court would have held the search to be unreasonable under the Fourth Amendment and ordered the evidence suppressed." *Rawlings v. Commonwealth, supra* at 350 n.1 (Lukowsky, J., dissenting).

their arrest if [he] thinks they may be dangerous to [him] or to other officers" (T.S.H., p. 7; App., p. 32). However, at trial Detective Railey testified that he believed the search warrant for the Marquess residence authorized him to "search any individual" there (T.E., pp. 168, 169).

Each person who was present in Lawrence Marquess' residence on October 18, 1978 "was clothed with constitutional protection against an unreasonable search or an unreasonable seizure." *Ybarra v. Illinois,* ____ U.S. ____, 100 S. Ct. 338, 342 (1979). "That individualized protection was separate and distinct from the Fourth and Fourteenth Amendment protection possessed by" Lawrence Marquess, the person who resided at the house in question. *Id.*, 100 S. Ct. at 342. "Although the search warrant, [if] issued upon probable cause, gave the officers authority to search the premises," it "gave them no authority whatever to invade the constitutional protections possessed individually by" the persons legitimately on the premises. *Id.*, 100 S. Ct. at 342-343.

"[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Ybarra v. Illinois, supra* at 342, citing *Sibron v. New York,* 392 U.S. 40, 62-63 (1968).

"[A] warrant to search a place cannot normally be construed to authorize a search of each individual in that place." *Id.*, 100 S. Ct. at 343 n.4. "The warrant for the [Marquess residence] provided no basis for departing from this general rule." *Id.* In the instant case, "the warrant itself" did not authorize "the search of unnamed persons in a place." *Id.*

No distinction in the instant case may be drawn between Ms. Cox's personal effects and the purse. It is true that

during her detention Ms. Cox and petitioner were seated on the couch with the purse between them (T.E., pp. 27, 45, 141; T.S.H. (I), p. 6; App., p. 32). The purse was in close proximity to Ms. Cox and the police treated the purse as her property, not as an adjunct of the premises. For example, one of the officers ordered Ms. Cox to stand and empty her purse onto the table (T.E., pp. 144, 155). Under these circumstances, the purse must be considered a personal effect of Ms. Cox, not a part of the premises.

It should be noted that Detective Railey neglected to seek a search warrant for the people present at the Marquess residence when he went to obtain a warrant to search the premises (T.S.H. (I), p. 19; App., p. 39; T.E., p. 167). This decision not to seek prior judicial authorization to search the persons of the people present may have been based on his real belief that the odor of burnt marijuana and the presence of seeds resembling marijuana seeds would not justify a search of those persons (see Argument II, *supra*). In any event the opportunity to obtain a search warrant for the detained individuals existed contemporaneously with the opportunity to obtain the search warrant for the premises. This factor should not be overlooked.

In any event, *Ybarra* controls the case at bar and precludes the use of the warrant to search the premises as a basis for searching the people present at the time the warrant is executed.[32]

As previously explained, the prosecution and the police officers attempted to justify the search of Ms. Cox on the grounds that efear for their personal safety, under the circumstances of the case, motivated and permitted their

[32]This Court decided *Ybarra v. Illinois, supra,* on November 28, 1979, approximately six months subsequent to the Kentucky Supreme Court's decision in the case at bar.

actions. However, Detective Railey testified that before the search warrant was obtained the police "didn't suspect that [these people] were fearful of being arrested or anything like that" (T.S.H. (I), p. 15; App., p. 37).

The initial search of Ms. Cox's purse "was simply not supported by a reasonable belief that [she] was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons." *Ybarra v. Illinois, supra,* 100 S. Ct. at 343.[33]

When the police entered the Marquess residence and discovered the five people there, they did not recognize petitioner or any of the others present "as a person with a criminal history" nor did they have "any particular reason to believe" that any of the five persons "might be inclined to assault them" (T.E., pp. 161, 173). *See Ybarra v. Illinois, supra,* 100 S. Ct. at 343.

For a forty-five minute period from the time the police entered the Marquess residence until they required Ms. Cox to empty the contents of her purse onto a table, the police had an extensive opportunity to observe the people who were found on the premises. No violence or disruptions of any sort occurred during the detention period.

The police initially entered the premises on the stength of an arrest warrant for Lawrence Marquess. In turn, the arrest warrant was based on an indictment against Marquess for trafficking in Schedule I controlled substances. According to police testimony at trial, Marquess, some three or four months prior to the issuance of the arrest warrant, had at his

[33]Parenthetically, it must be remembered that the search of Ms. Cox's purse exceeded the scope of the permissible patdown authorized by *Terry*. Even had the requirements of *Terry* been met, the officers could have merely separated Ms. Cox from her purse before they commenced their search of the residence. This would have protected the police without compromising Ms. Cox's Fourth Amendment rights.

Bowling Green residence sold a quantity of LSD to an undercover agent (T.S.H. (I), p. 3; App., p. 30; T.E., p. 179). Consequently, the three or four months which had elapsed since the LSD sale could have done little to convince the police that the Marquess residence was at the time of their entry being used as sale place for LSD. In a similar vein it must be remembered that the personal use of marijuana and the possession of marijuana are simply misdemeanors in Kentucky. As a result, the police had no real basis to conclude that the residence in question was a hot bed of drug trafficking.

In the final analysis, the prosecution was "unable to articulate any specific fact that would have justified a police officer at the scene in even suspecting that [Vanessa Cox or petitioner were] armed and dangerous." *Ybarra v. Illinois, supra,* 100 S.Ct. at 343.

"Under [the *Terry*] doctrine a law enforcement officer, for his own protection and safety, may conduct a patdown to find weapons that he reasonably believes or suspects are then in the possession of the person he has accosted." *Ybarra v. Illinois, supra,* 100 S.Ct. at 343.

"Nothing in *Terry* can be understood to allow a generalized 'cursory search for weapons' or indeed, any search whatever for anything but weapons." *Ybarra v. Illinois, supra,* 100 S.Ct. at 343-344. "The 'narrow scope' of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized narcotics search is taking place." *Id.*

Discussing the inherently incredible testimony of the police officers in the instant case, the dissenting judge in the intermediate court opined that "[t]he unconvincing testi-

mony of the police is to the effect that once the search warrant was read they all experienced fear for their safety emanating from [the] three detainees . . . to such an extent that it became necessary to . . . conduct the in depth or inside the outer clothing search" (App., p. 73). "It is incredulous that the policemen experienced the sudden fear they claimed they did after joining with [petitioner] and his friends for better than a half hour listening to phonograph records" (App., p. 73).

According to the trial court, "[t]he problem before the Court on the Motion to Suppress is to determine whether or not the exigencies of the circumstances as stated permitted the officers to search the parties before beginning a search of the residence for which they had a search warrant or would a search of the persons without a search warrant for their search be in violation of the 4th Amendment to the Constitution" (T.R., p. 93; App., p. 20).

The trial court found "that the officers were in a place where they had a right to be and that they had a right and legal authority to search the house pursuant to the search warrant, and that the exigencies of these circumstances in that knowing that this residence had been used for the sale of Lysergic Acid Diethylamide in the past and that there was a gun in the house; that their search of the premises had to do with the presence of contraband, the possession of which constituted a crime and that therefore a perfunctory search of the persons, including the contents of Mrs. Cox's purse, was permitted under the 4th Amendment to the Constitution and, as a matter of fact and common sense was a required procedure" (T.R., p. 93; App., p. 20).

In *Ybarra* this Court specifically rejected a similar request "to construe the Fourth and Fourteenth Amendments to permit evidence searches of persons who, at the commence-

ment of the search, are on 'compact' premises subject to a search warrant, at least where the police have a 'reasonable belief' that such persons 'are connected with' drug trafficking and 'may be concealing or carrying away the contraband.' " *Ybarra v. Illinois, supra,* 100 S.Ct. at 344-345.

Assuming *arguendo* that this Court decides that petitioner is constitutionally entitled to contest the illegality of the search of Ms. Cox's purse and the seizure of the drugs in her possession (see Argument I, *supra*), then the principles delineated in *Ybarra* and *Terry,* both *supra,* dictate that the warrantless search of the purse and the seizure of the drugs, under the factual circumstances of the case at bar, must be deemed unconstitutional. Accordingly, the drugs and other items should have been suppressed and all references to those items excluded from petitioner's state trial. 3 LaFave, Search and Seizure, *supra,* §11.4, p. 667. Of course, petitioner's admissions of ownership of the drugs found in Ms. Cox's purse must likewise be suppressed since the antecedent reference for petitioner's remarks was the illegally seized evidence. *Wong Sun v. United States, supra.* Petitioner's statements of ownership were the direct result of the police confronting both Ms. Cox and him with the illegally seized evidence and the police questioning Ms. Cox and then petitioner to ascertain ownership of the drugs.

The prosecution's improper use of both the items, including the drugs in question, illegally seized from Ms. Cox's purse and petitioner's tainted admissions of ownership of the drugs renders petitioner's state court conviction constitutionally invalid and mandates reversal of the conviction below.

IV.

THE SEARCH OF PETITIONER'S PERSON, OSTENSIBLY CONDUCTED INCIDENT TO A VALID ARREST, VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS SINCE PROBABLE CAUSE FOR THE ARREST WAS PREDICATED ON THE FRUITS OF A PRIOR ILLEGAL SEARCH AND SEIZURE OF CONTRABAND DRUGS.

After commenting that the search of petitioner's person did "not involve such complicated principles as the search of the purse," the Kentucky Supreme Court "validate[d] this search on the theory of a search incident to a valid arrest." *Rawlings v. Commonwealth, supra* at 350. Although concerned that "the sequence of the search of the purse and [petitioner's] admission of ownership of the drugs is not clearly established in the record," the Kentucky Supreme Court held that "[c]learly, after [petitioner] admitted ownership of the drugs, the officers were entitled to arrest and search the person, or search and then arrest." *Rawlings v. Commonwealth, supra* at 350, citing *Cupp v. Murphy,* 412 U.S. 291 (1973).

Obviously, this analysis is susceptible to severe challenge. "[T]he search of [petitioner's] person was unlawful because it was not incident to a valid arrest." *Rawlings v. Commonwealth, supra* at 352 (Lukowsky, J., dissenting). "The 'second' arrest upon which the search was based was itself unlawful because it was based upon the fruits of the illegal search for and seizure of the drugs in Cox's purse." *Id.*

Assuming *arguendo* that this Court rules, first, that petitioner is constantly entitled to challenge the search of Ms. Cox's purse and the attendant seizure of the contraband

drugs (see Argument I, *supra*) and, second, that the search of that purse and the seizure of its contents were constitutionally improper (see Arguments II and III, *supra*), then the virtually contemporaneous arrest and search of petitioner, predicated on the prior illegality, were the "fruits" of the poisonous tree" and any evidence obtained thereby must be suppressed.

"If the police conduct an illegal search and as a consequence discover evidence which provides probable cause that a particular person has committed a crime, an arrest of that person based upon this informtion is unquestionably tainted, provided of course the arrestee had standing to object regarding the antecedent search." 3 LaFave, Search and Seizure, *supra,* §11.4(e), p. 646. However, "the mere existence of such a prior illegal search does not inevitably taint a subsequent arrest, for it may be that the arrest will be found to have a sufficiently factual basis apart from the illegal search." *Id.* The constitutional test under the Fourth Amendment is whether "the connection between the lawless conduct of the police and the discovery of the challenged evidence has become 'so attenuated as to dissipate the taint.' " *Wong Sun v. United States, supra* at 487.

In the instant case, virtually no time elapsed between the primary illegality and the search and arrest of petitioner; similarly, no intervening circumstances occurred. All in all, no factor exists which arguably could dissipate the taint of the primary illegality.

Accordingly, the items seized during the search of petitioner were required to be suppressed and excluded in all manner from petitioner's state trial. This failure to suppress constituted a substantial violation of petitioner's Fourth and Fourteenth Amendment rights which mandates reversal of petitioner's conviction.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Kentucky affirming petitioner's conviction should be reversed upon the grounds delineated above.

Respectfully submitted,

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

Attorney for Petitioner

Supreme Court, U.S.
FILED
FEB 29 1980
MICHAEL RODAK, JR., CLERK

FOR ARGUMENT

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5146

DAVID RAWLINGS - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

On Writ of Certiorari to the
Supreme Court of Kentucky

BRIEF FOR RESPONDENT

STEVEN L. BESHEAR
Attorney General

VICTOR FOX
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

On the Brief:
GERALD HENRY
Assistant Attorney General

PATRICK B. KIMBERLIN, III
Assistant Attorney General
Counsel for Respondent

WESTERFIELD-SONTE CO., 619 W. KENTUCKY—P.O. BOX 3291, LOUISVILLE, KY.

INDEX

	PAGE
Table of Authorities	ii–iii
Opinion Below	1
Jurisdiction	1– 2
Questions Presented	2
Constitutional Provision Involved	2
Counterstatement of the Case	3– 5
Summary of Argument	5– 7
Argument	7–34
Conclusion	35
Certificate of Service	36

TABLE OF AUTHORITIES

Cases:

	PAGE
Alderman v. United States, 394 U. S. 165, 175 (1969)	10, 18, 24–25, 29
Brown v. Illinois, 422 U. S. 590 (1975)	28, 31
Brown v. United States, 411 U. S. 223, 228 (1973)	14
Davis v. Mississippi, 394 U. S. 721 (1969)	31
Dunaway v. New York, 442 U. S. ____ (1979)	31, 33
Harris v. New York, 401 U. S. 222 (1971)	16, 17, 18
Jett v. Commonwealth, Ky., 436 S. W. 2d 788, 792 (1969)	19
Jones v. United States, 362 U. S. 257 (1960)	*passim*
Katz v. United States, 389 U. S. 347 (1967)	11, 22, 25, 27
Mancusi v. DeForte, 392 U. S. 364 (1968)	11
Mapp v. Ohio, 367 U. S. 643 (1961)	8
Miranda v. Arizona, 384 U. S. 436 (1966)	16
Rakas v. Illinois, 439 U. S. 128 (1978)	*passim*
Simmons v. United States, 390 U. S. 377 (1968)	*passim*
Stone v. Powell, 428 U. S. 465, 486 (1976)	17
Terry v. Ohio, 392 U. S. 1 (1968)	31
United States v. Calandra, 414 U. S. 338, 348 (1974)	17, 29
United States v. Ceccolini, 435 U. S. 268, 275 (1978)	17, 33
United States v. Festa, 190 F. Supp. 160 (Mass. 1969)	32
United States v. Hunt, 505 F. 2d 931, 937 (5th Cir. 1974)	28
United States v. Janis, 428 U. S. 433 (1976)	17, 32
United States v. Van Leeuwen, 397 U. S. 249 (1970)	31
Walder v. United States, 347 U. S. 62, 65 (1954)	18
Weeks v. United States, 232 U. S. 383 (1914)	8
Ybarra v. Illinois, ____ U. S. ____ (1979)	7, 31, 33

U. S. Constitution:

	PAGE
Fourth Amendment	*passim*
Fourteenth Amendment	2

Miscellaneous:

"A Person Aggrieved": Standing to Suppress Illegally Seized Evidence in Transition, Gutterman, 23 Emory Law Journal 111 (1974)	11

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

No. 79-5146

DAVID RAWLINGS - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky (Appendix hereinafter designated App., pp. 76-83) is reported as *Rawlings* v. *Commonwealth,* Ky., 581 S. W. 2d 348 (1979). The opinion of the Court of Appeals of Kentucky (App., pp. 61-67) is not reported.

JURISDICTION

The opinion of the Supreme Court of Kentucky was entered on May 1, 1979. The mandate of the Supreme Court of Kentucky was issued in petitioner's case on May 22, 1979 (App., p. 84). The petition for

writ of certiorari was granted on December 10, 1979 (App., p. 85). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

I. Whether the petitioner had reasonable expectation of privacy in the area searched or the contraband seized, and whether the search and seizure infringed any privacy interest of the petitioner which the Fourth Amendment was designed to protect?

II. Whether petitioner's detention while a search warrant was obtained was a violation of his rights under the 4th and 14th Amendments to the Federal Constitution?

III. Whether the search of the purse of Vanessa Cox was an infringement of her legitimate expectation of privacy interest?

IV. Whether petitioner's arrest and subsequent search were a violation of his 4th and 14th Amendment rights?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions petitioner has invoked are the Fourth and Fourteenth Amendments to the Federal Constitution.

COUNTERSTATEMENT OF THE CASE

As a part of a large scale roundup of indicted drug offenders police officers went to the rented residence of Lawrence Marquess on October 18, 1976. The police had an arrest warrant for Mr. Marquess based on an indictment for trafficking in LSD (App., p. 30; T.E., pp. 132-134).

When the police arrived at the house, Mr. Dennis Saddler, another resident of the house, testified that petitioner went to the door to answer it. The front door, according to Mr. Saddler, had not been opened while he lived there. While Saddler was not sure of how the police did get in the door, he is sure that neither the main entry door or outer screen door were broken (T.E., pp. 106-108).

Immediately prior to the police announcement at the front door, petitioner had brought out a green bank bag and dumped its contents into the purse of Mrs. Cox (T.E., pp. 12-13; App., p. 51). *Mrs. Cox told petitioner to remove the stuff from her purse and petitioner agreed that he would* (T.E., pp. 13-14). The police arrived at the front door not more than two or three minutes after petitioner had placed the drugs in the purse (App., p. 51; T.E., p. 34).

When the police entered the house they were told that the subject named in the search warrant was not present (App., p. 31). However, five other persons were present. These five included a resident of the house, Dennis Saddler, Vanessa Cox, the petitioner and two other transients (App., p. 31). The two transients (Linda Braden and Keith Northern) had been stopped

from leaving through the back door by officers who had gone to the back prior to the announcement at the front door (T.E., p. 193). A walk-through search confirmed Marquess' absence (App., p. 31). However, during the walk-through Officer Railey observed what appeared to be marijuana seeds and a rifle (App., p. 31). He also observed the distinctive aroma of marijuana smoke throughout the house (T.E., p. 135). As a result of these observations it was decided within two or three minutes to obtain a search warrant (T.E., pp. 136, 173). Officers Railey and Bruce left to get the warrant and the remaining officers detained the individuals in the house (App., p. 45). The five were informed that they would be permitted to leave if they submitted to a search (App., p. 46). Two of them did so and departed (App., p. 46). No interrogation or any other form of intrusion was made on those who did not submit to a search (App., p. 45). Some 30 minutes later the officers returned with a search warrant (App., pp. 32, 46). After reading the warrant, the search started with Mrs. Cox's purse (App., p. 32). When the purse was emptied, a large quantity of LSD and other drugs was found (App., p. 33).

Petitioner made no statement when the purse was emptied, but when Mrs. Cox looked at him and told him to take what was his, petitioner reached over and got the drugs (T.E., pp. 28-29). After this act petitioner was asked if the drugs were his and he so acknowledged (T.E., p. 31). Following this admission petitioner was patted down and the money and knife were found and petitioner arrested (T.E., p. 46).

At a suppression hearing, petitioner admitted placing the drugs in Mrs. Cox's purse (App., p. 42). In response to his counsel's question, *petitioner admitted he did not expect the purse to be free from intrusion nor that it was to be private* (App., pp. 42-43) *for his possessions.*

After his motions to suppress were overruled, petitioner on his motion was tried without a jury (App., pp. 12-13). Contrary to his plea of not guilty, he was found quilty and sentenced to five years confinement (App., p. 22). Both the Court of Appeals of Kentucky and the Supreme Court of Kentucky affirmed the conviction before this Court granted certiorari.

SUMMARY OF ARGUMENT

I

The "automatic standing" concept of *Jones* v. *United States,* 362 U. S. 257 (1960) is no longer necessary in view of *Simmons* v. *United States,* 390 U. S. 377 (1968) and *Rakas* v. *Illinois,* 439 U. S. 128 (1978). *Jones* created "automatic standing" in two situations (1) for those individuals legitimately on the premises during the search and (2) for those individuals where possession of that which was seized was an essential element of the crime charged. This concept permitted individuals to vicariously assert a violation of another's Fourth Amendment rights.

Simmons, supra, removed one of the apparent necessities when it was held that evidence given in a suppression hearing could not be introduced later on the issue of guilt. *Rakas, supra,* struck down the "legiti-

mately on the premise" concept and in so doing abandoned the property concept of standing by placing the analysis under the heading of substantive Fourth Amendment doctrine.

Application of the substantive Fourth Amendment right of reasonable expectation of privacy to the remaining aspect of the *Jones* case results in the conclusion that "automatic standing" in possession cases is no longer necessary. This is because the abandonment of the property concept eliminates the evil of the prosecution on suppression arguing against "possession" and at trial arguing the "possession" for guilt. Under *Rakas,* the government may now argue against any reasonable expectation of privacy at suppression and argue possession at trial without any real or imagined conflict of positions which detract from the orderly administration of justice.

II

The detention of petitioner for a short time interval while a search warrant was obtained did not constitute an unreasonable seizure. The fact that there was probable cause to obtain a search warrant was not diminished by the fact that state law did not permit an arrest for a misdemeanor on probable cause. Nor does the fact the search warrant which was obtained later proved defective as to petitioner make the initial detention illegal.

Assuming *arguendo* the detention was illegal, application of the exclusionary rule does not rule out the evidence sought to be suppressed since it was either not used against him or was not the result of police conduct.

III

The Commonwealth admits that in view of *Ybarra* v. *Illinois,* —— U. S. —— the search of the purse belonging to Vanessa Cox was an unlawful intrusion, but that petitioner lacked a sufficiently reasonable expectation of privacy to receive the benefits of the exclusionary rule.

IV

The legality of petitioner's detention has no effect on his arrest and incidental search. The admission of guilt in response to a plea from a non-official acquaintance was an intervening factor sufficient to remove the taint of any illegal detention. The Commonwealth responds to the legality of the detention in Argument II, *supra.*

ARGUMENT

I.

THE PETITIONER HAD NO REASONABLE EXPECTATION OF PRIVACY IN THE AREA SEARCHED OR THE CONTRABAND SEIZED, THEREFORE THE SEARCH AND SEIZURE DID NOT INFRINGE ANY PRIVACY INTEREST OF THE PETITIONER WHICH THE FOURTH AMENDMENT WAS DESIGNED TO PROTECT.

The Fourth Amendment to the United States Constitution insures that the citizens of this country will be protected from illegal search and seizures. The core value protected by the Fourth Amendment is privacy, more specifically, the privacy of the individual against impermissible governmental intrusion. In order to

protect the citizenry against impermissible searches and seizures this Court established an exclusionary rule which prohibits the introduction of evidence seized in violation of the Fourth Amendment from being introduced into evidence at trial. *Weeks* v. *United States,* 232 U. S. 383 (1914); *Mapp* v. *Ohio,* 367 U. S. 643 (1961). The primary purpose of the exclusionary rule is to act as a deterrent against impermissible police activities in conducting searches and seizures. However, since the creation of the exclusionary rule this Court, as well as numerous state and federal courts, has continually been confronted with the necessity of balancing the competing considerations of effectuating Fourth Amendment protections on the one hand with the cost to society on the other in permitting the criminal to go free. This balancing of competing interests has been brought more clearly into focus in the last twenty years as a consequence of the approach to be taken in determining whether one has been a victim of an illegal search and seizure.

Historically, an accused could make such a claim only if he alleged and established that he had a possessory or proprietary interest in the premises searched or the object seized. In other words, he first had to establish that he had "standing" to raise constitutional issue of an alleged illegal search and seizure. And, necessarily, this concept of "standing" became immersed in the subtleties of real and personal property law. As a consequence of the significance of property law concepts in determining whether one had "standing," courts throughout the country on both the

state and federal levels became mired in a morass of often conflicting opinions as to "standing." Permitting property concepts to be, in effect, determinative of Fourth Amendment rights proved unsatisfactory because it ignored the true issue of whether one's right to privacy had been violated. *An interest in property did not necessarily indicate an interest in privacy.*

Moreover, the analysis and resolution of "standing" questions was further complicated in criminal cases where the offense charged included "possession" as a critical element of the crime itself. In such cases the accused found himself on the horns of a dilemma since in order to have "standing" to attack an allegedly illegal search and seizure he would have to claim "possession" of the item seized, yet at trial he had to deny "possession" in order to escape prosecution on the possessory offense. The government on the other hand was given the benefit of a self-contradictory position in that it could charge the accused with "possession" of the illegal property for purposes of the offense charged yet argue in a pre-trial hearing on a motion to suppress that the accused had no "standing" to attack the search and seizure because he did not have "possession" of the illegal property.

In *Jones* v. *United States,* 362 U. S. 257 (1960) this Court attempted to resolve the quandry presented in possessory offense cases by creating "automatic standing" (a) where possession at the time of the contested search and seizure was an essential element of the offense charged, and (b) to anyone legitimately on

premises[1] where a search occurred. The purpose of the *Jones* decision was to eliminate (1) the *self-incrimination dilemma* of the accused in such cases and (2) to prevent the government taking advantage of *self-contradictory positions.* However, it would appear over the past twenty years that the "cure" created in the *Jones* case has been found to be a great deal worse than the disease it was intended to eradicate. As a consequence of the nearly total abandonment in possessory offense cases of the pre-1960 standing concepts grounded on property law, imperfect as they were, and permitting automatic standing, the scope of Fourth Amendment protections was improperly broadened to include those individuals who otherwise would never have had access to such constitutional protections because they had no substantive Fourth Amendment right to privacy abridged.

Since the *Jones* decision, and more particularly since 1967, it would appear that this Court's approach to what has been the traditional doctrine of standing[2] in search and seizure cases has gradually been diminished in favor of a doctrine predicated upon the right to personal privacy from governmental intrusion protected under the Fourth Amendment, privacy being a core value to be protected as a matter of substantive

[1]". . . property rights reflect society's explicit recognition of a person's authority to act as he wishes in certain areas, and therefore should be considered in determining whether an individual's expectations of privacy are reasonable." *Rakas* v. *Illinois, supra,* at 153. Also see *Alderman* v. *United States,* 394 U. S. 165 (1969).

[2]Either automatic standing, as in Jones, or actual standing predicated upon property concepts as in pre-Jones cases.

Fourth Amendment law. "A Person Aggrieved": *Standing to Suppress Illegally Seized Evidence in Transition,* Gutterman, 23 Emory Law Journal 111 (1974). For example, in *Katz* v. *United States,* 389 U. S. 347 (1967) this Court resolved a Fourth Amendment search and seizure issue by utilizing the *privacy approach* in determining whether Fourth Amendment protections did or did not apply in an electronic eavesdropping case implicitly rejecting the property approach. In resolving another Fourth Amendment search and seizure issue in *Mancusi* v. *DeForte,* 392 U. S. 364 (1968) this Court acknowledged that although the accused had standing under the *Jones* doctrine of "legitimately on the premises" test, the holding appeared to be based on the privacy concept previously announced in the *Katz* case.

This slowly emerging transition by the Court from the traditional concept of *standing* whether "actual" or "automatic" to the more recent approach of "expectation of privacy" has perhaps reached maturity in the recent decision of *Rakas* v. *Illinois,* 439 U. S. 128 (1978) wherein this Court abandoned the "standing" concept in favor of an analysis of search and seizure claims by an examination of the "expectation of privacy" the allegedly offended individual has in the place searched or the objects seized. Although this Court recognized that property rights reflect society's recognition of an individual's authority to act with respect to certain things and areas and should therefore be given some consideration, the scope of the Fourth Amendment must be determined by the degree of pri-

vacy that a free people may legitimately expect. *Rakas* v. *Illinois, supra,* at 151. Thus, this Court concluded in effect that property rights cannot support a Fourth Amendment claim *in the absence of a reasonable expectation of privacy in the property in question.* Conceptually, the issue is not one of traditional standing but more properly a substantive question of whether an accused's Fourth Amendment rights were violated by the search. The test under *Rakas* is, (1) whether the accused personally had, under substantive Fourth Amendment law, an interest in privacy protected by the Fourth Amendment, and (2) whether that interest in privacy has been infringed by the challenged search and seizure.

The transition from the old standing doctrine, predicated upon property law principles, and the subsequent automatic-standing doctrine which arose from the quandry presented by property standing considerations in possessory offense cases, to the present "expectation of privacy" doctrine is of significance to the case at bar. As previously noted, the protections accorded under the Fourth Amendment evolved from the concept of individual privacy and are necessarily unique and personal to the individual. The property considerations employed in pre-*Jones* cases in determining standing would not necessarily guarantee that the individual who had a possessory or proprietary right in a place or thing also had an interest in privacy protected under the Fourth Amendment. Nor did the pre-*Jones* standing doctrine provide an avenue for relief to the person whose substantive Fourth Amend-

ment interest or right to privacy had been violated if he were unable to establish that he had either a possessory or proprietary right in the place searched or the thing seized.

Nor did *Jones* v. *United States, supra,* prove any more helpful in possessory offense cases because it was assumed legally that one had "standing," and this assumption was based totally upon circumstances which might have no relevance at all to any substantive Fourth Amendment consideration. In fact, the *effect* of *Jones* all too often was not merely to assume the accused had automatic "standing" in possessory offense cases, but that this "standing" somehow also established a Fourth Amendment violation. These inconsistencies in determining Fourth Amendment rights in search and seizure cases required a new approach.

The expectation of privacy doctrine represents a realistic and flexible standard of societal norms in determining the scope of the protections accorded under the Fourth Amendment. Under this new expectation of privacy concept a possessory or proprietary interest may or may not be a factor to consider in resolving the substantive constitutional issue under the Fourth Amendment, depending upon the circumstances.[3] No single factor is determinative in the resolution of whether one has a reasonable expectation of privacy. Such a determination would depend upon several factors including, (1) the nature of the premises or activity, (2) the extent of personal interest in the premises, (3) the steps taken by the individual to

[3] *Rakas* v. *Illinois, supra,* n.8.

maintain privacy of the area or activity, and (4) society's characterization of the place and activity. It is the privacy doctrine upon which the respondent shall rely in resolving the primary issue before this Court—did the search of Vanessa Cox's purse violate the petitioner's rights under the Fourth Amendment?

A.

Jones v. *United States*, 362 U. S. 257 (1960) May Not Be Relied Upon by the Petitioner as Giving Him Automatic Standing to Challenge the Search of Vanessa Cox's Purse.

In *Rakas* v. *Illinois*, 439 U. S., at 128 n.4 and *Brown* v. *United States*, 411 U. S., at 228, this Court reserved the issue of whether the "automatic standing" rule enunciated in *Jones* v. *United States*, 362 U. S. 257 (1960) survives this Court's decision in *Simmons* v. *United States*, 390 U. S. 377 (1968). That question was specifically reserved for a case, such as the one at bar, where possession at the time of the challenged search and seizure is an essential element of the offense charged. The respondent submits that the time has now come for this Court to hold that the "automatic standing" rule, in light of *Simmons* v. *United States* and *Rakas* v. *Illinois*, ceases to exist in possessory offense cases.

The purpose for the *Jones* v. *United States* decision was to:

(1) eliminate the self incrimination dilemma confronted by the accused who found himself in the position of having to assert a possessory or proprietary

interest in the property to establish "standing" and subsequently having to deny such a proprietary or possessory interest at the trial on the merits of the possessory offense charge, and also (2) the vice of prosecutorial self-contradiction, that is, allowing the government to allege possession as part of the offense charged and yet deny that there was possession sufficient for "standing" purposes.

The respondent will now show that neither of these two underpinnings of the *Jones* decision reflect a viable basis for the continuation of the automatic standing doctrine.

(1) THE DILEMMA OF SELF-INCRIMINATION.

To a large extent the self-incrimination dilemma found in *Jones* was resolved by this Court in its holding in *Simmons* v. *United States* wherein it was held that the testimony of an accused in support of a motion to suppress evidence on Fourth Amendment grounds could not subsequently be used against him "on the issue of guilt" upon proper objection. *Simmons* v. *United States*, 390 U. S., at 394. Thus, the self-incrimination dilemma, at least insofar as such testimony goes to "the issue of guilt," is no longer a consideration as it was in *Jones*. However, *Simmons* did not prohibit the use of such pre-trial testimony for *all purposes*.

The respondent will now address those other aspects of self-incrimination which according to the petitioner render *Simmons* v. *United States, supra,* ineffective in protecting the accused in possessory offense cases from the dilemma of self-incrimination.

a.

The Threat of Impeachment.

The petitioner argues that though *Simmons* v. *United States* eliminates the use of pre-trial testimony insofar as it goes to the issue of guilt, the accused is still confronted with various other aspects of self-incrimination by the use of such pre-trial testimony as would require extending the constitutional umbrella of protection. For example, he raises the specter of the threat of being impeached at trial by the testimony he had previously given at the suppression hearing. Petitioner points out that in Fifth Amendment cases this Court has held that an accused's statements which are otherwise inadmissible under *Miranda* v. *Arizona,* 384 U. S. 436 (1966) are admissible at trial for impeachment purposes. *Harris* v. *New York,* 401 U. S. 222 (1971). The petitioner concludes that the impeachment aspect of such testimony presents great concern because this Court previously indicated that the privacy approach it is now taking in Fourth Amendment cases has already been employed with respect to the Fifth Amendment privilege in self-incrimination cases.[4]

It is the position of the respondent that the possible subsequent introduction of suppression hearing testimony at the trial on the merits for impeachment pur-

[4]In *United States* v. *Kahan,* 415 U. S. 239, 243 (1974) this Court acknowledged that although *Simmons* barred the use of pre-trial testimony at trial to prove its incriminating *content,* such testimony is admissible when the incriminating nature of the pre-trial statements derive not from their content but from the accused's knowledge of their *falsity.*

poses does not present a problem of overriding constitutional concern. This Court has never held that unlawfully seized evidence is inadmissible in all proceedings or against all persons. *Rakas* v. *Illinois,* 439 U. S. at 134. *United States* v. *Ceccolini,* 435 U. S. 268, 275 (1978); *Stone* v. *Powell,* 428 U. S. 465, 486 (1976); *United States* v. *Calandra,* 414 U. S. 338, 348 (1974). The exclusionary rule came into existence as an attempt by this Court to give vitality to the Fourth Amendment. The prime purpose of the exclusionary rule, "if not the sole one," is to deter future unlawful police conduct. *United States* v. *Janis,* 428 U. S. 433 (1976). However, the application of the exclusionary rule has been restricted to those areas where its' remedial objectives are believed to be "most efficaciously served." *United States* v. *Calandra,* 414 U. S. at 348 (where otherwise inadmissible evidence could be shown to a grand jury).

Accordingly, whether the possible introduction of such prior testimony at the trial on the merits for impeachment is justified constitutionally must be resolved by "balancing the interests'"[5] between detering illegal police conduct on the one hand, and the social cost of excluding otherwise relevant evidence in a criminal prosecution. In *Harris* v. *New York, supra,* this Court resolved such an issue, within the context of the Fifth Amendment, by finding that "sufficient de-

[5]Petitioner's reliance on *New Jersey* v. *Portash,* ____ U. S. ____, 99 S. Ct. 1291 (1979) in support of his contention that the "balancing of interests" formula is "impermissible" here, is misplaced. The case *sub judice,* unlike *Portash* does not involve the use of compelled testimony.

terrance flows when the evidence in question is made unavailable to the prosecution *in its case in chief.*" (Emphasis ours). 401 U. S., at 225. The respondent submits that the reasoning employed by this Court in *Harris* v. *New York* is likewise both analogous and appropriate to the resolution of this similar issue within the context of the Fourth Amendment. After all, the petitioner should not be allowed to turn to his own advantage the perhaps unlawful manner by which the police acquired its evidence. *Walder* v. *United States,* 347 U. S. 62, 65 (1954). The respondent contends that the shield devised by this Court in *Simmons* v. *United States* was never intended to be so all-encompassing as urged by the petitioner.

On balance, the value to society and the criminal justice system of insuring against the occurrence of perjury in criminal cases demands the conclusion that an accused may be impeached by pre-trial statements he has made at a suppression hearing. To hold otherwise would give the accused, in criminal cases where possession is an essential element of the charged, carte blanche immunity from a traditional truth-testing device of the adversary system.[6] Moreover, such a holding would also effectively result in a broad brush extension, even though tangentially, of the exclusionary rule and such extensions have been looked upon with extreme caution by this Court, *Alderman* v. *United States,* 394 U. S. 165, 175 (1969). Thus, the alleged

[6]The respondent would submit that there would be few if any cases arising wherein pre-trial testimony of the accused, within the context used here, would be introduced at trial other than have impeachment purposes as previously set out in Part A.

threat of impeachment constitutes no threat whatsoever in the constitutional sense to the rights of the petitioner under the Fourth Amendment.

b.

The Threat of Substantive Use of Prior Inconsistent Statements.

The petition also directs the Court's attention to yet another "aspect of self-incrimination to which a criminal accused might be susceptible, the threat of the substantive use of prior inconsistent statements. Petitioner points out that such statements are admissible under Kentucky law as substantive evidence which may be admitted through the testimony of another witness, and would not be limited to impeachment purposes. *Jett* v. *Commonwealth,* Ky., 436 S. W. 2d 788, 792 (1969). He concludes that such evidence is yet another example of how the accused may be exposed to the self-incrimination dilemma despite the holding of *Simmons* v. *United States, supra.*

However, the need for a deterrent against improper police action in the search of a premises or the seizure of property against the dictates of the Fourth Amendment does not require that that deterrent be absolute. The use of the exclusionary rule in effectuating the protections of the Fourth Amendment need and, indeed, should not go to extremes. The possibility, or threat, that substantive use of prior inconsistent statements of the accused is, on balance, of no substantial constitutional significance when weighed against the negative effects against society that an expansion of the

exclusionary rule doctrine would have. The cost to society which would be extracted in terms of injustice would be far too great a burden.

The respondent submits that limiting instructions to the jurors with reference to the manner in which an accused's prior inconsistent statements at a suppression hearing were to be used would be constitutionally sufficient, if necessary at all, to protect the accused's rights. Again, the fact that pre-trial testimony could not be used against the accused "as to the issue of guilt" constitutes sufficient deterrence. No extension of the exclusionary rule is constitutionally required to guarantee the vitality of the Fourth Amendment.

c.

The Threat of a Prosecutorial "Fishing Expedition."

The final "aspect" of self-incrimination faced by an accused is the threat of a prosecutorial "fishing expedition" wherein the government at a suppression hearing may attempt to extricate incriminating information from the accused. Petitioner argues that at such a hearing the government may attempt to elicit testimony from the accused which would generate investigative leads to enhance the prosecution's case or to produce new and perhaps related charges against the accused.

Again, the respondent is constrained to point out that the decision in *Simmons* v. *United States, supra,* goes no further but to the limit the use of such testimony only as it goes to the accused's guilt or innocence on the merits at the trial. This, and this alone, is a

sufficient deterrent to impermissible police conduct under the Fourth Amendment. The fact that the prosecution may elicit at the suppression hearing some bit of information from the accused which might further incriminate him on the offenses with which he stands charged, or generate other related charges against him, is simply a valid part of the adversarial process in the criminal justice system. If the petitioner's reasoning were carried to its logical end nothing that the accused in a criminal case might say which could possibly subsequently incriminate him could ever be used. Again, such a result is absurd and serves neither the purposes of the Fourth Amendment, the exclusionary rule, the criminal justice system, or society as a whole.

(2) PROSECUTORIAL SELF-CONTRADICTION.

It is the position of the respondent that the second underpinning for *Jones* v. *United States,* prosecutorial self-contradiction, on longer presents a legally sufficient cause to perpetrate the automatic standing doctrine. The *Jones* decision was the result of the head on collision which occurred when the traditional standing doctrine, which was predicated on property law concepts, was applied to criminal cases wherein the essention element of the offense charged is possession. The resulting legal enigma was two-fold: (1) the dilemma of self-incrimination faced by the accused and (2) the dilemma of prosecutorial self-contradiction. The respondent has previously shown that the self-incrimination dilemma has been resolved by the application of *Simmons* v. *United States.* We will now undertake

to establish that application of the expectation of privacy doctrine eliminates the dilemma of prosecutorial self-incrimination.

The respondent submits that the newly evolved "expectation of privacy" doctrine eliminates the problem of prosecutorial self-contradiction which previously existed under the earlier property standing concepts. Since *Rakas* the dilemma of prosecutorial self-contradiction no longer exists because now the government can maintain at trial that the accused had lawful "possession" of the property at the time of the search, yet at the suppression hearing the government can argue that the accused had *no legitimate expectation of privacy* in either the search or the seizure. No inconsistency arises from these two positions. The government is no longer saddled with the inconsistent positions of arguing "possession" by the accused for standing purposes. This is so because the expectation of privacy doctrine eliminates possessory and proprietary interests as the *sine qua non* which was previously necessary to establish the right to Fourth Amendment protections. Now, in light of *Rakas* v. *Illinois, supra,* and *Katz* v. *United States, supra,* only reasonable and legitimate expectations of privacy are protected under the Fourth Amendment. *Rakas,* 439 U. S., at 151 (Powell, J., Concurring). Possession merely constituites a factor to be considered and weighed in the totality of the circumstances in resolving whether a legitimate and reasonable expectation of privacy has been violated under the Fourth Amendment.

In summary the respondent submits that the rationale of the "automatic standing" rule enunciated in *Jones* v. *United States, supra,* fails to survive this Court's subsequent decisions in *Simmons* v. *United States, supra,* and *Rakas* v. *Illinois, supra.* This is true regardless of whether the offense charged is possessory or non-possessory in nature. The self-incrimination dilemma, of concern in *Jones,* is resolved by *Simmons* which prohibits the use of the accused's pre-trial testimony as evidence on the issue of guilt at trial. And, the "expectation of privacy" doctrine as set out in *Rakas* v. *Illinois, supra,* eliminates the problem of prosecutorial self-contradiction. Accordingly, since the reasons for the automatic standing rule cease to exist, so should the rule itself.

B.

Petitioner's Mere Claim of Ownership of the Items Seized Does Not Resolve the Issue of Whether He Had a Reasonable Expectation of Privacy in Either the Items Seized or the Area Searched.

The petitioner persists in his argument as to"standing." He maintains that he has actual standing to raise the issue of the alleged illegal search and seizure because after Mrs. Cox's purse was searched he admitted ownership of the drugs found therein. He now maintains that this mere claim of ownership in the contraband is sufficient, in and of itself, to give him "standing" to raise the Fourth Amendment issue. The respondent respectfully disagrees.

It would appear from the petitioner's brief that he has failed to grasp the fact that this Court in *Rakas* v. *Illinois, supra,* abandoned the proposition that possessory or proprietary interests in property are *in and of themselves* determinative of one's rights under the Fourth Amendment to the United States Constitution.[7] First, it must be recognized that in *Rakas* v. *Illionis, supra,* this Court clearly and unequivocally rejected the concept of "standing" as being an imperfect method by which to resolve Fourth Amendment search and seizure questions. Thus, consideration of whether petitioner had "standing" is totally irrelevant, regardless of his possessory interest in the drugs.

Secondly, the petitioner's allegation of ownership of the contraband[8] seized is merely a factor to be considered in determining whether he had a reasonable and legitimate expectation of privacy in the contraband or in the area searched. This Court recognized that property rights reflect society's explicit recognition of a person's authority to act in certain areas and therefore should be *considered* in determining whether an individual's expectations of privacy are reasonable. *Rakas* v. *Illinois,* 439 U. S., at 153; *Alder-*

[7]An address book allegedly belonging to the petitioner was also seized when, Mrs. Cox emptied her purse. However, there is nothing in the record to indicate that this particular item, which was not contraband, incriminated petitioner in any manner whatsoever.[1] The "legitimately on premises" doctrine had been abandoned by this Court in *Rakas* v. *Illinois,* 439 U. S. 128 (1978).

[8]The importance of the property interest to standing took on such significance and became so intertwined with Fourth Amendment claims that many courts came to the conclusion, incorrectly, that if one had a property interest violated he also had a viable Fourth Amendment violation.

man v. *United States,* 394 U. S. 165 (1969). Thus, the more traditional property rights rationale may be employed under the expectation of privacy doctrine because property concepts are to *some degree* societal recognitions of privacy expectations. *Rakas* v. *Illinois, supra,* at 144, n. 12.

However, it is submitted that under the expectation of privacy doctrine the mere claim of ownership in an item or a premises may not be sufficient to establish that a legitimate expectation of privacy exists with respect to a particular item seized or the premises searched. The resolution of such an issue would depend totally upon the particular facts and circumstances surrounding each case. After all, the scope of the Fourth Amendment must be determined by the scope of privacy that a free people legitimately may expect. Thus, for an expectation to deserve the protections of the Fourth Amendment it must be one that society is prepared to recognize as reasonable. *Katz* v. *United States, supra.*

Accordingly, petitioner's allegation of ownership of the contraband, by itself, is of no particular significance. Suffice it to say that the nature of petitioner's interest in the seized contraband, insofar as establishing "standing" is concerned, is irrelevant under the reasonable expectation of privacy doctrine since the concept of "standing" is no longer relevant in light of *Rakas* v. *Illinois, supra.*

C.

The Search of Mrs. Cox's Purse and the Subsequent Seizure of Contraband Therefrom Did Not Violate Any Reasonable Expectation of Privacy Interest of the Petitioner Which the Fourth Amendment Was Designed to Protect.

It would appear that the decision of this Court in *Rakas* v. *Illinois, supra,* sets forth the following two-pronged test which must be utilized in resolving Fourth Amendment search and seizure questions: (1) whether the accused personally had, under substantive Fourth Amendment law, an interest protected by the Fourth Amendment, and (2) whether that interest has been infringed by the allegedly objectionable search and seizure. The respondent submits that in this case the petitioner had no reasonable expectation of privacy in either the contraband seized or in the search of Mrs. Cox's purse.[9]

Here, the petitioner asked Mrs. Cox to keep the drugs in her purse, and he placed them there before she could respond (T.E., p. 13). Mrs. Cox did not want the drugs in her purse and did not give her permission to petitioner to place them there. In fact, as soon as petitioner had placed the drugs in her purse, she immediately asked him to remove them (T.E., pp. 13-14, 24). He agreed to do so momentarily but insisted that he first had to go to the bathroom. Before he returned the police had made their entry into the house. Twenty to forty-five minutes later when Mrs.

[9]See note 7, *supra.*

Cox emptied her purse at the direction of the police, she looked at petitioner and told him to "take what is yours" (T.E., pp. 144-149, 28-29). As petitioner took his drugs a policeman asked him if the drugs were his and petitioner admitted ownership (T.E., pp. 29-32). At the second suppression hearing petitioner admitted that he did not feel the drugs in the purse would be free from governmental intrusion (App., p. 48).

The above facts unequivocally establish that:

(1) petitioner had no actual (subjective) expectation of privacy in Mrs. Cox's purse,

(2) his alleged expectation of privacy is clearly unreasonable under given societal norms,

(3) the alleged possessory interest of petitioner was in contraband, and

(4) petitioner seeks to vicariously assert the Fourth Amendment rights of another.

First, it is clear under both *Rakas* v. *Illinois* and *Katz* v. *United States* that petitioner must have exhibited an actual expectation of privacy and it must be one that society is prepared to recognize as reasonable. The facts in this case unequivocally establish that petitioner neither had nor reasonably expected any "privacy" in placing the drugs in Mrs. Cox's purse.

Secondly, the respondent urges that even had the petitioner exhibited an actual expectation of privacy, such an expectation of privacy, predicated upon petitioner's claim of ownership of contraband, is not one that society would be prepared to recognize as reasonable. A realistic and flexible standard of societal norms must be employed in determining the scope of Fourth

Amendment protections. Is the keeping of illicit drugs (or any other contraband) realistically acceptable by society and thus "reasonable"? Respondent submits that it is not.

This Court has previously held that an accused has no protected interest in stolen property. *Brown* v. *United States,* 411 U. S. 223 (1973). The respondent urges this Court to hold that there is no constitutionally protected expectation of privacy interest in contraband. Or, alternatively, if an accused does have an interest in contraband said interest should be held to be of such minimal consideration for constitutional purposes as not to fall within the protections of the Fourth Amendment to the United States Constitution. To hold otherwise would permit an accused in a case such as this to successfully invoke the protections of the Fourth Amendment upon the sole ground of his personal claim of possession to illegal property which in itself is condemned under societal norms. Such a conclusion is not a reasonable one in terms of either simple logic or under societal norms. *Rakas* v. *Illinois,* 439 U. S., at 128. A mere assertion of a property interest cannot support a Fourth Amendment claim in the absence of a reasonable expectation of privacy, which as previously noted does not exist in this case. *United States* v. *Hunt,* 505 F. 2d 931, 937 (5th Cir. 1974). To permit an accused to invoke the protection of the Fourth Amendment by the mere assertion of ownership in contraband "creates too broad a guage for measurement of Fourth Amendment rights." Compare *Rakas* v. *Illinois,* 439 U. S., at 142. Thus,

the petitioner's expectations of privacy in the contraband itself is not a reasonable one.

Third, it is submitted that the petitioner cannot derivatively invoke any expectation of privacy that Mrs. Cox had in her purse. Fourth Amendment rights are personal in nature and cannot be vicariously asserted by third parties. *Alderman* v. *United States, supra.* In recent years this Court has appeared to consistently narrow the scope of application of the Fourth Amendment, and properly so, given the fact that "privacy" is the core value protected by that Amendment.

Finally, it should be noted that the application of the exclusionary rule has been limited to those areas where its remedial objective, deterence of police misconduct, is believed to be most efficaciously served. *United States* v. *Calandra,* 414 U. S. 338, 348 (1974). The factual circumstances of this case would serve to broaden the application of the exclusionary rule in criminal cases and such an extension would be contrary to the stance this Court has recently taken in both *Rakas* v. *Illinois, supra,* and *Alderman* v. *United States, supra.* The respondent submits that extending the benefits of the exclusionary rule to those such as the petitioner cannot be justified in light of the heavy toll such an extension would take against the public interest in prosecuting those accused of dealing in drugs and having them convicted on the basis of all the evidence which exposes the truth.

Under these circumstances the respondent submits that the search of Mrs. Cox's purse and the subsequent

seizure of contraband, belonging to petitioner, did not violate any reasonable expectation of privacy interest of the petitioner which the Fourth Amendment was designed to protect. Finally, to hold under the facts of this case, that petitioner's Fourth Amendment rights were violated would constitute an unconscionable extension of the exclusionary rule doctrine at the cost of the further encroachment on society's interest in convicting those who have violated its laws.

II.

PETITIONER'S DETENTION WHILE A SEARCH WARRANT WAS OBTAINED WAS NOT A VIOLATION OF HIS RIGHTS UNDER THE 4TH AND 14TH AMENDMENTS TO THE FEDERAL CONSTITUTION.

Petitioner asserts that he has the right to challenge not only his own detention but the detention of Mrs. Cox as well. Respondent simply submits that petitioner cannot protest the legality of Mrs. Cox's detention. (See Argument I, *supra.*)

It is clear that the petitioner was detained without a warrant. It is equally as clear that the police officers intended to and thought they had obtained a warrant which would permit a search of the individuals.[10] This

[10]Q. What I was getting at was the reason for not getting a search warrant for these people just at the same time.

A. I didn't know that it didn't say persons on there. I thought it did. Probably a mistake on my part. (App. p. 39).

Q16. Now I believe Officer Railey testified here that when he went and got that warrant, he thought and intended that he would be permitted to search the persons when he returned. Is that your intention also in getting that warrant?

A. Yes sir.

(Footnote continued on following page)

temporary detention while a warrant was sought is not an intrusion of the types condemned by this Court in *Dunaway* v. *New York,* 442 U. S. —— (1979), *Davis* v. *Mississippi,* 394 U. S. 721 (1969), *Brown* v. *Illinois,* 422 U. S. 590 (1975) and *Ybarra* v. *Illinois,* —— U. S. —— (1979). Those cases of course involved either a search or a seizure without probable cause. The restraint in the case before the bar is nearer to the type of intrusion permitted in *Terry* v. *Ohio,* 392 U. S. 1 (1968), but is still different.

In the instant case probable cause existed to obtain a search warrant or to arrest if the suspected offense were a felony. The fact that state law did not permit an arrest for a misdemeanor on probable cause did not alter or remove the existence of probable cause. If there is probable cause to obtain a search warrant, then, given the mobility of the person or thing to be searched and the nature of the suspected offense, it would not be unreasonable to detain the person or the thing for a period of time until the warrant arrives. In *United States* v. *Van Leeuwen,* 397 U. S. 249 (1970) the detention of a piece of mail for a period of 29 hours in order to obtain a warrant was acceptable under the facts. Here the detention was 20-45 minutes,[11] which while it

Q17. To come back there and search the persons who were present there; is that correct

A. Yes sir, to search the persons in the house. (T.E. p. 183).

[11]The estimated times were:

Cox	45 minutes to an hour	T.E. pp. 27, 42
Saddler	20-30 minutes	T.E. pp. 113, 114
Officer Bivens	30 minutes	T.E. p. 154
Officer Railey	30-35 minutes	T.E. p. 137
Officer Wood	20-25 minutes	T.E. p. 202

was of people was nevertheless on balance reasonable. Cf. *United States* v. *Festa,* 190 F. Supp. 160 (Mass. 1969).

What should police do when they find themselves in this type situation? Are they powerless to take any steps to foreclose the risk a person may depart the premises? Should they shrug their shoulders and turn away? Prohibiting police officers from detaining for a reasonable time period in order to obtain a judicially granted search results in an unresolvable dilemma for the police. If they search without a warrant, it must be under one of the recognized exceptions permitting warrantless searches. On the other hand if they have probable cause to obtain a search warrant (and under the circumstances cannot arrest) but cannot restrict departure, then there is no point in getting the warrant since the individual will be gone long before the search warrant can be executed.

Assuming, *arguendo,* that petitioner's detention was illegal, the question is what, if anything, must be excluded. Petitioner would have the money, the knife and his acknowledgment as to the drugs all excluded.

The exclusionary rule applies only to evidence the police illegally obtained and which is used against the defendant. *United States* v. *Janis, supra.* In the case before the bar, the money was not introduced into evidence against the petitioner until the petitioner on cross-examination mentions the money (T.E., p. 60). Later a portion of the money was admitted into evidence (T.E., pp. 146-147). While the knife was mentioned by the government, it was never introduced

into evidence as it had been returned prior to trial to petitioner. It must be again pointed out that petitioner was tried before a judge without a jury and that the passing references to the money and knife would have little if any impact on the case.

Petitioner acknowledged the drugs were his, not as a result of any police interrogation, but rather from a strong request by the person left holding the bag that he take what was his (T.E., pp. 28-29). The Commonwealth would submit that this strong plea, given the circumstances surrounding the placement of the drugs to begin with (T.E., pp. 12-14), constituted a sufficient break in the causal connection between the detention and the statement. This, we submit, was sufficient attenuation of any taint. *United States* v. *Ceccolini,* 435 U. S. 268 (1977), *Dunaway* v. *New York,* 442 U. S. —— (1979).

III.

THE SEARCH OF THE PURSE OF VANESSA COX WAS AN INFRINGEMENT OF HER LEGITIMATE EXPECTATION OF PRIVACY INTEREST.

The Commonwealth admits, as it has all along that the search of Mrs. Cox's purse was a warrantless search. It would further appear that under *Ybarra* v. *Illinois,* —— U. S. ——, if Mrs. Cox were asserting her own 4th Amendment rights, that the exclusionary rule would apply. However, despite the apparent invasion of *her* expectation of privacy, the Commonwealth maintains that petitioner may not benefit therefrom. (See Argument I, *supra*).

IV.

PETITIONER'S ARREST AND SUBSEQUENT SEARCH WERE NOT A VIOLATION OF HIS 4TH AND 14TH AMENDMENT RIGHTS.

In response to petitioner's assertions in his final question the Commonwealth would simply state that if petitioner cannot assert an expectation of privacy in Mrs. Cox's purse (see Argument I, *supra*) and that his detention was not unreasonable (see Argument II, *supra*), then his arrest and search were legal.

Even if he were able to attack the search of the purse, his voluntary acknowledgment of the drugs in response to Mrs. Cox is sufficient to diminish the taint (see Argument II, *supra*) and establish an independent cause for the arrest.

CONCLUSION

Based upon the foregoing reasons and arguments the Commonwealth urges the Court to abolish "automatic standing" for possessory offenses and affirm the decision of the Supreme Court of Kentucky.

Respectfully submitted,

STEVEN L. BESHEAR
Attorney General

VICTOR FOX
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601

On the Brief:
GERALD HENRY
Assistant Attorney General

PATRICK B. KIMBERLIN, III
Assistant Attorney General
Counsel for Respondent

CERTIFICATE OF SERVICE

I, Victor Fox, counsel for respondent, hereby certify that the foregoing Brief for Respondent was served on petitioner by depositing three copies of same in the United States mail, first class postage prepaid, on February 29, 1980, addressed to counsel for petitioner, Hon. J. Vincent Aprile II, Assistant Deputy Public Advocate, Office for Public Advocacy, State Office Building Annex, Frankfort, Kentucky 40601.

Victor Fox

VICTOR FOX
Assistant Attorney General

Supreme Court, U.S.
FILED
MAR 24 1980
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5146

DAVID RAWLINGS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI

TO THE SUPREME COURT OF KENTUCKY

PETITIONER'S REPLY BRIEF

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
Office for Public Advocacy
State Office Building Annex
Frankfort, Kentucky 40601

Attorney for Petitioner

I N D E X

PAGE

TABLE OF AUTHORITIES..... i

ARGUMENT:

I. PETITIONER HAS STANDING TO RAISE A CLEAR VIOLATION OF VANESSA COX'S FOURTH AMENDMENT RIGHTS AS A VIOLATION OF HIS OWN CONSTITUTIONAL RIGHTS ON THE BASIS THAT HE OWNED THE PROPERTY SEIZED AND THE OFFENSE CHARGED IS THE UNLAWFUL POSSESSION OF THAT PROPERTY..... 1

A. PETITIONER WAS ENTITLED TO AUTOMATIC STANDING TO CONTEST THE SEARCH OF VANESSA COX'S PURSE BECAUSE HE WAS CHARGED WITH OFFENSES THAT INCLUDED, AS AN ESSENTIAL ELEMENT OF EACH OFFENSE CHARGED, POSSESSION OF THE SEIZED EVIDENCE AT THE TIME OF THE CONTESTED SEARCH AND SEIZURE..... 1

C. PETITIONER WAS ENTITLED TO CONTEST THE SEARCH OF VANESSA COX'S PURSE BECAUSE THAT SEARCH VIOLATED HIS REASONABLE EXPECTATION OF PRIVACY..... 9

II. THE SEARCHES AND SEIZURES WHICH PRODUCED THE CONTRABAND DRUGS AND OTHER INCRIMINATING EVIDENCE WERE THE FRUITS OF THE UNCONSTITUTIONAL ARRESTS OF BOTH PETITIONER AND VANESSA COX IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUITON..... 14

CONCLUSION..... 17

CERTIFICATE OF SERVICE..... 18

TABLE OF AUTHORITIES

Cases:

Arellanes v. United States, 302 F.2d 603 (9th Cir. 1962)..... 6

Arkansas v. Sanders, ____ U.S. ____, 99 S.Ct. 2586 (1979)..... 12

Brown v. Illinois, 422 U.S. 590 (1975)..... 14

Brown v. Texas, ____ U.S. ____, 99 S.Ct. 2637 (1979)..... 14, 15

Brown v. United States, 411 U.S. 223 (1973)..... 8

Davis v. Mississippi, 394 U.S. 721 (1969)..... 14

Delaware v. Prouse, ____ U.S. ____ 99 S.Ct. 1391 (1979)..... 15

PAGE

Dunaway v. New York, ____ U.S. ____, 98 S.Ct. 2248 (1979)..... 14

Harris v. New York, 401 U.S. 222 (1971)..... 2, 3

Jones v. United States, 362 U.S. 257 (1967)..... 6

McGautha v. California, 402 U.S. 183 (1971)..... 2

Mancusi v. De Forte, 392 U.S. 364 (1960)..... 11, 12

Mincey v. Arizona, ____ U.S. ____, 98 S.Ct. 2408 (1978)..... 17

Miranda v. Arizona, 384 U.S. 436 (1966)..... 2

Nye & Nissen v. United States, 330 U.S. 613 (1949)... 7

Pennsylvania v. Mims, 434 U.S. 106 (1977)..... 14

Rakas v. Illinois, 439 U.S. 128 (1978)..... 5, 14

Rawlings v. Commonwealth, 481 S.W.2d 348 (1979)..... 17

Schmerber v. California, 384 U.S. 757 (1966)..... 17

Simmons v. United States, 390 U.S. 377 (1968)..... 2, 3

Terry v. Ohio, 392 U.S. 1 (1968)..... 14

United States v. Bethea, 442 F.2d 790 (D.C. Cir. 1971)..... 6

United States v. Brignoni-Ponce, 422 U.S. 873 (1975). 14

United States v. Carneglia, 468 F.2d 1084 (2nd Cir. 1972)..... 6

United States v. Casalinuovo, 350 F.2d 207 (2nd Cir. 1965)..... 6

United States v. Chadwick, 433 U.S. 1 (1977)..... 11, 12

United States v. DiNovo, 523 F.2d 197 (7th Cir. 1975)..... 6

United States v. Holland, 445 F.2d 701 (D.C. Cir. 1971)..... 6

United States v. Loane, ____ F.Supp. ____, (No. 79-42; E.D. Ky. 1980)..... 5, 8

United States v. Peoni, 100 F.2d 401 (2nd Cir. 1938)..... 7

United States v. VanLeeuwen, 397 U.S. 249 (1970)..... 16

Ybarra v. Illinois, ____ U.S. ____, 100 S.Ct. 338 (1979)..... 14

Other Authorities:

Goffman, Erving, Relations in Public (Basic Books, Inc., New York 1971)..... 11, 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5146

DAVID RAWLINGS,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON WRIT OF CERTIORARI

TO THE SUPREME COURT OF KENTUCKY

PETITIONER'S REPLY BRIEF

ARGUMENT

I.

PETITIONER HAS STANDING TO RAISE A CLEAR VIOLATION OF VANESSA COX'S FOURTH AMENDMENT RIGHTS AS A VIOLATION OF HIS OWN CONSTITUTIONAL RIGHTS ON THE BASIS THAT HE OWNED THE PROPERTY SEIZED AND THE OFFENSE CHARGED IS THE UNLAWFUL POSSESSION OF THAT PROPERTY.

A. PETITIONER WAS ENTITLED TO AUTOMATIC STANDING TO CONTEST THE SEARCH OF VANESSA COX'S PURSE BECAUSE HE WAS CHARGED WITH OFFENSES THAT INCLUDED, AS AN ESSENTIAL ELEMENT OF EACH OFFENSE CHARGED, POSSESSION OF THE SEIZED EVIDENCE AT THE TIME OF THE CONTESTED SEARCH AND SEIZURE.

1. The Dilemma of Self-Incrimination

a. The Threat of Impeachment

Respondent asserts that "the possible subsequent introduction of suppression hearing testimony at the trial on the merits for impeachment purposes does not present a problem of overriding constitutional concern" (Respondent's Brief, p. 17). Emphasizing that "the reasoning employed by this Court in Harris v. New York," 401 U.S. 222 (1971), is "both analogous and appropriate to the resolution" of the impeachment aspect of the self-incrimination dilemma, respondent concludes that "an accused may be impeached by pre-trial statements he made at a suppression hearing" (Respondent's Brief, pp. 17-18). This conclusion is the product of respondent's misanalysis.

Harris allowed the use of previously excluded evidence for impeachment purposes on the basis that an ample deterrent effect on proscribed police conduct was generated by making the unconstitutionally obtained statements of the defendant unavailable to the prosecutor in its case in chief. Harris v. New York, supra at 225.[1] However, in Simmons v. United States, 390 U.S. 377 (1968), this Court "held it unconstitutional for the [prosecution] to use at trial the defendant's testimony given on an unsuccessful motion to suppress evidence allegedly seized in violation of the Fourth Amendment." McGautha v. California, 402 U.S. 183, 211 (1971). "[T]o permit such use created an unacceptable risk of deterring the prosecution of marginal Fourth Amendment claims, thus weakening the efficacy of the exclusionary rule as a sanction for unlawful police behavior." Id.

In situations similar to Harris, the prosecution has available to use against the defendant his pretrial statement made to the police in violation of Miranda v. Arizona, 384 U.S. 436 (1966). If the defendant does not

---

[1] Acknowledging that "the impeachment process ... undoubtedly provided valuable aid to the jury is assessing [the defendant's] credibility," this Court in Harris held that "the benefits of this process should not be lost ... because of the speculative possibility that impermissible police conduct will be encouraged thereby." Harris v. New York, supra at 225. "Assuming that the exclusionary rule has a deterrent effect on proscribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." Id.

move to exclude the statement on constitutional grounds, the prosecution will use it against him in its case in chief. If he is successful in suppressing the statement, the defendant is then confronted with a decision whether to testify since the excluded pretrial statement is constitutionally admissible as impeachment evidence if it is inconsistent with the accused's trial testimony.

The Harris situation is in marked contrast to the impeachment aspect of the self-incrimination dilemma involved in certain Fourth Amendment claims. To assert his right to challenge the constitutionality of the search and seizure in his case, the defendant must weigh the very real risk that, if his suppression motion fails, his testimony at the suppression hearing may be introduced against him at trial on the theory that it is "inconsistent" with his trial testimony and is thereby admissible as impeachment evidence.

Consequently, the application of the Harris rationale to justify the use of the accused's suppression testimony for impeachment purposes at his trial functions to deter the assertion of Fourth Amendment claims and substantially weakens the efficacy of the exclusionary rule as a disincentive to unlawful searches and seizures.

In urging the demise of the "automatic standing" rule, some critics have suggested that if the use of a defendant's suppression hearing testimony for impeachment purposes at trial unacceptably deters assertion of Fourth Amendment claims then "the appropriate course would be to expand the Simmons use-immunity, not to perpetuate the 'automatic standing' rule" (United States v. Salvucci. No. 79-244, Reply Brief for the United States, p. 3 n.2). Such an alternative proposal only serves to acknowledge the reality of petitioner's position that the various facets of the self-incrimination dilemma have survived the Simmons decision.

c. The Threat of a Prosecutorial "Fishing Expedition"

Dismissing the threat of a prosecutorial "fishing expedition" as a serious aspect of the self-incrimination dilemma, the respondent opines that "[t]he fact that the prosecutor may elicit at the suppression hearing some bit of information from the accused which might further incriminate him on the offenses with which he is charged, or generate other related charges against him, is simply a valid part of the adversarial process in the criminal justice system" (Respondent's Brief, p. 21). This response, endorsing the ploy of prosecutorial "fishing expeditions" as a legitimate technique of the prosecution, constitutes a veritable concession by the respondent as to the reality of this problem and the deterrent effect it generates on the assertion of Fourth Amendment claims.

It has been suggested that the fear of a prosecutorial "fishing expedition" is "completely unrelated to the 'special problem' ... regarding possessory offenses" which generated the "automatic standing" rule since this problem "is equally applicable to all suppression hearings" (United States v. Salvucci, Reply Brief for the United States, p. 4). This contention is shakily constructed on a highly unrealistic premise. Obviously, the prosecution's opportunity for eliciting incriminating information from a defendant who testified at a suppression hearing to establish his right to challenge a particular search and seizure will be greatest in those situations where the defendant is charged with a possessory offense.

When, as in the case sub judice, the defendant to demonstrate his right to contest the search and seizure must acknowledge his ownership of contraband items such as drugs, the prosecutor, in most instances, will have an ideal opportunity to delve into such matters as the source of these drugs, the defendant's purpose in obtaining the drugs, and to whom the defendant had previously given, sold or offered the drugs.

Where the defendant merely testifies at the suppression hearing that he owned the premises searched or a relatively innocuous evidentiary item which was seized, the prosecutor's options for conducting a "fishing expedition" are considerably reduced.

2. The Vice of Prosecutorial Self-contradiction

In a cursory, highly semantical analysis, respondent asserts that since Rakas v. Illinois, 439 U.S. 128 (1978), "the dilemma of prosecutorial self-incrimination no longer exists because now the government can maintain at trial that the accused had lawful 'possession' of the property at the time of the search, yet at the suppression hearing the government can argue that the accused had no legitimate expectation of privacy in either the search or the seizure" (Respondent's Brief, p. 22; emphasis in original).

The respondent's argumentation does little to establish that the "vice of prosecutorial self-contradiction" and its corollary result - "the injustice of an internally inconsistent conviction". - would not continue to occur should the "automatic standing" rule be abolished.

"When the government charges a possessory offense, it is in fact alleging the defendant owns the item, in a broad context of ownership." United States v. Loane, ____ F.Supp. ____ (No. 79-42; E.D. Ky. 1980), opinion rendered January 22, 1980; 26 CrL 2482 (March 5, 1980). "Once the government alleges ownership, the defendant need not take the stand to assert that same ownership." Id., 26 CrL at 2483. "Rather an expectation of privacy is conferred upon the defendant by the nature of the allegations of his ownership of such item." Id., 26 CrL at 2483.

Viewed from this perspective, it is apparent that respondent is in error when he suggests that "the newly evolved 'expectation of privacy' doctrine eliminates the problem of prosecutorial self-contradiction which previously existed under the earlier property standing concepts" (Respondent's Brief, p. 22).

Critics of the "automatic" standing principle contend that Jones v. United States, 362 U.S. 257 (1967), "failed to recognize that the concept of 'possession' can have different meanings in the context of criminal law, where it serves to demarcate antisocial conduct and culpable behavior, and in the context of the Fourth Amendment, where ... it helps to illuminate the existence of a legitimate expectation of privacy" (United States v. Salvucci, No. 79-224, Brief for United States, filed January 28, 1980, pp. 24-25). The fallacy of this contention is amply demonstrated by the substantive criminal law concept of constructive possession.

"[C]onstructive possession means being in a position to exercise dominion or control over a thing." United States v. Holland, 445 F.2d 701, 703 (D.C. Cir. 1971). Under substantive criminal law principles, "[s]uch a position should not be lightly imputed to one found in another's apartment or home." Id. "If an inference of constructive possession must be made, the jury must have before it information about the regularity with which the person in question occupied the place and about his special relationship with the owner or renter." Id. See United States v. Bethea, 442 F.2d 790 (D.C. Cir. 1971).

By judicial definition, constructive possession is "such a 'nexus or relationship between the defendant and the goods that it is reasonable to treat the extent of the defendant's dominion and control as if it were actual possession.'" United States v. Carneglia, 468 F.2d 1084, 1087 (2nd Cir. 1972), citing United States v. Casalinuovo, 350 F.2d 207, 209 (2nd Cir. 1965).

Under the doctrine of constructive possession, "mere proximity to the drug, mere presence on the property where it is located, or mere association, without more, with the person who does control the drug or the property on which it is found, is insufficient to support a finding of possession." United States v. DiNovo, 523 F.2d 197, 201 (7th Cir. 1975), citing Arellanes v. United States, 302 F.2d 603, 606 (9th Cir. 1962).

From this perusal of the general precepts governing the application of the principle of constructive possession, it is readily apparent that the requisite ingredients for constructive possession - the accused's "dominion or control over a thing" and a sufficient "nexus or relationship between the defendant and the goods" - are, barring highly unusual circumstances, demonstrative of a possessory interest in the premises searched or the evidence seized, an interest of the defendant which the Fourth Amendment was designed to protect.

Certainly an inherent self-contradiction is generated within the context of a prosecution premised on a theory of the defendant's constructive possession when the government at the suppression hearing vigorously challenges the accused's "dominion and control" over the seized evidence in an effort to defeat his right to contest the validity of the search and seizure, but at trial marshals its evidence in an endeavor to convince the jury that the accused had a sufficient connection with the seized property to have constructively possessed it.

To illustrate the absence of "prosecutorial self-contradiction" in certain prosecutions for possessory offenses, disparagers of the "automatic" standing rule question its use in a prosecution where the defendant "who aids and abets another's unlawful possession is deemed to have committed that possessory offense as a principal" (United States v. Salvucci, Brief for the United States, p. 27).

According to general tenets of substantive criminal law,[2] a person who is prosecuted as a principal on the theory of aiding and abetting the unlawful possession of a contraband drug would not necessarily be charged with an offense that includes, as an essential element of the

[2]"In order to aid and abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed.'" Nye & Nissen v. United States, 330 U.S. 613, 619 (1949), citing United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938).

offense charged, his possession of the seized evidence at the time of the contested search and seizure. Brown v. United States, 411 U.S. 223, 229 (1973). Under the normal circumstances of an aider and abettor theory of prosecution in a possessory offense case, the alleged aider and abettor would not be entitled to "automatic standing."

It must be remembered that the "automatic standing" rule is not applicable to a situation where "the Government's case against [the defendant] does not depend on [the defendant's] possession of the seized evidence at the time of the contested search and seizure." Brown v. United States, 411 U.S. 223, 228 (1973). This, of course, would be the normal situation in the aiding and abetting example posed by the critics of "automatic standing."

Obviously then, little weight can be given to the criticism that the "automatic standing" rule creates unacceptable results when it is applied to a person prosecuted as an aider and abettor to a possessory offense since by this Court's prior decisions such an extension or application of the doctrine of "automatic standing" is clearly erroneous.

In the final analysis, "the rationale for automatic standing is still as valid as it was at the time of Jones." United States v. Loane, supra, 26 CrL at 2483. "The objection that the sovereign, whose obligation is to assure justice for all, should not be heard to take inconsistent positions at a suppression hearing and trial is still as valid as it ever was." Id.

A "primary justification for the automatic standing rule is the repugnance of a representative of the sovereign coming before the court at succeeding stages of the proceeding with arguments against a defendant that are not only inconsistent but self-contradictory." Id.

C. PETITIONER WAS ENTITLED TO CONTEST THE SEARCH OF VANESSA COX'S PURSE BECAUSE THAT SEARCH VIOLATED HIS REASONABLE EXPECTATION OF PRIVACY.

In an effort to support his contentions that "petitioner had no actual (subjective) expectation of privacy in Mrs. Cox's purse" and that petitioner's "alleged expectation of privacy is clearly unreasonable under given societal norms," respondent argues that, although "petitioner asked Mrs. Cox to keep the drugs in her purse," he "placed them there before she could respond" (Respondent's Brief, p. 26, citing T.E., p. 13). Respondent further interpolates the evidence to show that "Mrs. Cox did not want the drugs in her purse and did not give her permission to petitioner to place them there" (Respondent's Brief, p. 26).

Petitioner disagrees with this analysis of the evidence. Petitioner testified at the pretrial suppression hearing that Ms. Cox gave him express permission to place some items in her purse (T.S.H. (II), p. 4; App., p. 42).[3] Additionally, Ms. Cox's trial testimony does not indicate that petitioner placed any items in her purse before she could respond to his request for permission or that at the time the items were actually placed in her purse she indicated she did not want them placed there.[4] To the contrary, Ms. Cox's testimony establishes it was only when she subsequently glanced in her purse that she became concerned about having petitioner's property in her purse (T.E., p. 13).

---

[3]At the December 1, 1976 pretrial suppression hearing, petitioner testified that as he and Vanessa Cox "were getting ready" to leave the Marquess residence "to go pick up [her] car" petitioner "asked her if she would carry this [the drugs and address book] for [him] and she said, 'yes'" T.S.H. (II), p. 4; App., p. 42). Petitioner explained that these items "were placed into her purse and then right at that time some people came in the back door," petitioner "went to the restroom," and "the knock [by the police] came on the front door" (T.S.H. (II), p. 4; App., pp. 42-43). According to petitioner's pretrial testimony, he placed the items in Ms. Cox's purse "approximately three, four minutes before" the police arrived at the Marquess residence (T.S.H. (II), p. 20; App., p. 51).

[4]At the trial Vanessa Cox testified that as she, petitioner and Dennis Saddler "were getting ready to leave" the Marquess residence "to go get [her] car," petitioner

It is true that Ms. Cox testified that she had asked petitioner, prior to the arrival of the police, to remove some or all of his property (the drugs and/or the address book) from her purse and that he had agreed to do so. However, this factor has little significance or relevance to petitioner's reasonable expectation of privacy in Ms. Cox's purse in view of other circumstances in the instant case.

For example, Ms. Cox's decision to allow petitioner's property to remain in her purse during forty-five minutes of police detention when she knew petitioner's property included a large amount of contraband drugs underscores Ms. Cox's implicit acquiescence in petitioner's use of her purse as a repository of his personal effects. Obviously, had Vanessa Cox of her own accord, rather than police compulsion, opened her purse, removed petitioner's property, and returned those items to him, then this would have served as a cancellation or recission of petitioner's privacy rights in Ms. Cox's purse. However, petitioner's expectation of privacy in Ms. Cox's purse was not terminated by her free and voluntary action, but as a result of an unconstitutional governmental intrusion into a constitutionally protected area. "It is, of course, irrelevant that [Vanessa Cox] might validly have consented to a search of [her purse] where the [drugs and address book] were kept, for it is not claimed that any such

---

"brought out a [dark] green [bank deposit] bag and said, 'would you please carry this for me. I don't want to carry this bag around'" (T.E., pp. 12, 35). At that point petitioner "kind of dumped ... the contents of the bank bag into [her] purse" (T.E., p. 13).

Ms. Cox did not know what was in the bank deposit bag (T.E., p. 13). It was only when she "glanced in [her] purse" that she "saw the one large vial which had several something in it and ... an address book" (T.E., p. 13). At that point in time Ms. Cox asked petitioner, "would you please take care of this, I do not want this in my purse. Would you mind taking it out?" (T.E., pp. 13-14, 24, 35). According to Ms. Cox, petitioner replied, "okay, just a minute, I will" (T.E., pp. 14, 15, 24). Petitioner then "went around the corner" towards the bathroom (T.E., p. 14). Ms. Cox added that "before [petitioner] had an opportunity to take it [the address book] out [of her purse] the policemen arrived" (T.E., pp. 14, 35).

consent was given, either expressly or by implication." Mancusi v. De Forte, 392 U.S. 364, 369-370 (1968).

Respondent contends that "petitioner cannot derivatively invoke any expectation of privacy that Mrs. Cox had in her purse" because "Fourth Amendment rights are personal in nature and cannot be vicariously asserted by third parties" (Respondent's Brief, p. 29). Such a simplistic analysis overlooks the realities of interpersonal relationships in society and the expectations of privacy generated by the joint use of either repositories for personal effects or premises.

The Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy." United States v. Chadwick, 433 U.S. 1, 7 (1977). In the case at bar, "important Fourth Amendment privacy interests were at stake." Id. at 11.

"By placing personal effects inside" Vanessa Cox's purse with her knowledge and apparent consent, petitioner "manifested an expectation that the contents would remain free from public examination." United States v. Chadwick, supra at 11. "No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment." Id.

The "contents" of a purse "are not open to public view"; a purse "is intended as a repository of personal effects." United States v. Chadwick, supra at 13. "In sum, a person's expectations of privacy in [a purse or] personal luggage" is substantial and legitimate.[5] Id.

---

[5]According to one social commentator, the concept of "possessional territory" means "[a]ny set of objects that can be identified with the self and arrayed around the body wherever it is"; "central examples [of possessional territory] are spoken of as 'personal effects' - easily detachable possessions such as jackets, hats, gloves, cigarette packs, matches, handbags and what they contain, and parcels." E. Goffman, Relations in Public 38 (1971). Similarly, an "information preserve" is "[t]he set of facts about himself to which an individual expects to control access while in the presence of others"; one variety of information preserve includes "the contents of pockets, purses, containers, letters, and the like, which the claimant can feel others have no right to ascertain." Id. at 38-39.

Petitioner's "principal privacy interest in [Vanessa Cox's purse] was, of course, not in the container itself, which was exposed to public view, but in its contents." United States v. Chadwick, supra at 13 n.8.[6]

"[L]uggage," whether "a locked, 200-pound footlocker" or a "comparatively small unlocked suitcase," is "a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." Arkansas v. Sanders, ____ U.S. ____, 99 S.Ct. 2586, 2592 (1979).

Even a person's "failure to lock" her purse or her inability to do so does not "alter its fundamental character as a repository for personal, private effects." Id., 99 S.Ct. at 2592 n.9. "Indeed, the very purpose of a suitcase" or a purse "is to serve as a repository for personal items when one wishes to transport them." Arkansas v. Sanders, supra, 99 S.Ct. at 2593.

Clearly petitioner "would have been entitled to expect" that the contents of his own briefcase or purse "would not be taken except with his permission." Mancusi v. De Forte, 392 U.S. 364, 369 (1968). "[T]he situation was not fundamentally changed because [petitioner] shared" the purse with its owner, Ms. Cox. Id. at 369. Petitioner still could reasonably have expected that the contents of Ms. Cox's purse "would not be touched except with [the] permission" of Ms. Cox. Id.

To ascertain whether society is prepared to recognize as reasonable an expectation of privacy generated by the shared use of a purse or briefcase, certain realities of personal and public relations should be considered.

---

[6]Of course, "[n]ot all containers and packages found by the police during the course of a search will deserve the full protection of the Fourth Amendment." Arkansas v. Sanders, ____ U.S. ____, 99 S.Ct. 2586, 2593 n.13 (1979). "Thus, some containers (for example, a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." Id., 99 S.Ct. at 2593 n.13.

"[I]t is the case that two or more individuals may together possess the same territory, jointly laying claim to it in the name of their collectivity." E. Goffman, Relations in Public 57 (1971). "Thus when an individual claims a table by sitting at it, he can indeed be claiming the table for his party, a social unit in which he is merely one participant." Id. "Every social relationship, both anonymous and personal, implies some joint tenure, and some relationships (such as marital ones) imply a great deal." Id.

"[A]n act which may intrude or expose when performed by one individual to another can be perfectly appropriate when performed by the same individual to someone else, someone with whom he shares the relevant territory." Id. "Thus a policeman who feels it necessary to ask a prostitute in the station to empty her own purse so he can inspect its contents is likely to feel free to dig into his wife's purse for change or cigarettes." Id.

When petitioner entrusted items to Ms. Cox for storage and even transportation in her purse, he took normal precautions to maintain his privacy. The shared use of a traditional repository of personal effects, such as a purse, briefcase, or luggage, generates an expectation of privacy in the nonowner of the shared repository that society is prepared to recognize as reasonable. To hold otherwise would rend the principles of law from the realities of daily life.

In the final analysis petitioner was constitutionally entitled to contest the legality of the search of Ms. Cox's purse on three distinct, but "invariably intertwined concepts" - the "automatic" standing rule, standing generated by an actual possessory or ownership interest in the property seized, and a "reasonable and legitimate expectation of privacy." All three of these methodologies function to demonstrate that the police search of Ms. Cox's purse and

the seizure of petitioner's personal property "infringed an interest of [the petitioner] which the Fourth Amendment was designed to protect." Rakas v. Illinois, 439 U.S. 128, 140 (1978).

II.

THE SEARCHES AND SEIZURES WHICH PRODUCED THE CONTRABAND DRUGS AND OTHER INCRIMINATING EVIDENCE WERE THE FRUITS OF THE UNCONSTITUTIONAL ARRESTS OF BOTH PETITIONER AND VANESSA COX IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

Respondent initially argues that the "temporary detention while a warrant was sought is not an intrusion of the types condemned" in Dunaway v. New York, ____ U.S. ____, 98 S.Ct. 2248 (1979), Davis v. Mississippi, 394 U.S. 721 (1969), Brown v. Illinois, 422 U.S. 590 (1975), and Ybarra v. Illinois, ____ U.S. ____, 100 S.Ct. 338 (1979), rather "the restraint in the case before the bar is nearer to the type of intrusion permitted in Terry v. Ohio, 392 U.S. 1 (1968), but is still different" (Respondent's Brief, p. 31).

Even assuming arguendo that the detention of Ms. Cox and petitioner was a seizure less intrusive than a traditional arrest, that detention constituted a violation of the Fourth Amendment.

"The reasonableness of seizures that are less intrusive than a traditional arrest," ultimately, "depends '"on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers."'" Brown v. Texas, ____ U.S. ____, 99 S.Ct. 2637, 2640 (1979), citing Pennsylvania v. Mims, 434 U.S. 106, 109 (1977), and United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

"Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Brown v. Texas, supra, 99 S.Ct. at 2640. "A central concern in balancing

these competing considerations in a variety of settings has been to assure that an individual's reasonable expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." Id., 99 S.Ct. at 2640, citing, inter alia, Delaware v. Prouse, ____ U.S. ____, 99 S.Ct. 1391, 1396-97 (1979).

To accomplish this goal, "the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." Brown v. Texas, supra, 99 S.Ct. at 2640.

Apparently respondent is attempting to justify the police detention of Ms. Cox, petitioner, and the three other people at the residence on the basis that the police were in the process of seeking a warrant which would permit a search of these five individuals (Respondent's Brief, pp. 30-31).

As previously explained in petitioner's initial brief, the warrantless arrest/detention of petitioner and the other people present at the Marquess residence was unconstitutional because it was not supported by probable cause to arrest" (Petitioner's Brief, pp. 67-71). That same analysis establishes that the police in the instant case also lacked "a reasonable suspicion, based on objective facts, that the individual," either Ms. Cox or petitioner, was "involved in criminal activity," or "had engaged in criminal conduct." Brown v. Texas, supra, 99 S.Ct. at 2641.

"In the absence of any basis for suspecting [petitioner or Ms. Cox] of misconduct, the balance between the public interest and [the] right [of petitioner and Ms. Cox] to personal security and privacy tilts in favor of freedom from police interference." Brown v. Texas, ____ U.S. ____, 99 S.Ct. at 2641.

Respondent, citing United States v. Van Leeuwen, 397 U.S. 249 (1970), notes that "the detention of a piece of mail for a period of 29 hours in order to obtain a warrant was acceptable under the facts" and reasons that "the detention" at bar of "20-45 minutes, which while it was of people, was nevertheless on balance reasonable" (Respondent's Brief, pp. 31-32).

Respondent's attempt to equate the detention of mail with the detention/arrest of people reveals a callous view of the function of the Fourth Amendment. As this Court observed in Van Leeuwen, "the only thing done here on the basis of suspicion was detention of the packages" which "at that point [created] no possible invasion of the right 'to be secure' in the 'persons, houses, papers and effects' protected by the Fourth Amendment against 'unreasonable searches and seizures.'" United States v. Van Leeuwen, supra at 1032. "No interest protected by the Fourth Amendment was invaded by forwarding the packages the following day rather than the day when they were deposited." Id. In Van Leeuwen "[t]he significant Fourth Amendment interest was in the privacy of [the] first-class mail" and "that privacy was not disturbed or invaded until the approval of the magistrate was approved." Id.

Because the Fourth Amendment, of course, applies to all seizures of the person, including seizures that involve only a brief detention short of a traditional arrest, the forty-five minute detention/arrest of petitioner and Ms. Cox cannot be dismissed on the basis of constitutional principles enunciated in the context of assessing the reasonableness of a 29-hour detention of mail.

Respondent's plea that "[p]rohibiting police officers from detaining [people] for a reasonable time period in order to obtain a judicially granted search results in an unreasonable dilemma for the police" is entitled to little persuasive value (Respondent's Brief, p. 32).

It is axiomatic that "warrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." Mincey v. Arizona, ____ U.S. ____, 98 S.Ct. 2408, 2414 (1978). Of course, the imminent destruction of evidence could constitute such an exigent situation. Schmerber v. California, 384 U.S. 757, 770-771 (1966). These principles of constitutional law render the police dilemma posited by respondent emminently resolvable without compromising essential Fourth Amendment rights.

As the dissenting justice in the Kentucky Supreme Court explained, "[a]ll evidence discovered [in the case at bar] was a result of this unlawful detention and should be suppressed as 'fruit of the poisonous tree.'" Rawlings v. Commonwealth, Ky., 581 S.W.2d 348, 351 (1979) (Lukowsky, J., dissenting).

CONCLUSION

For the foregoing reasons as well as those delineated in petitioner's initial brief, the judgment of the Supreme Court of Kentucky affirming petitioner's conviction should be reversed.

Respectfully Submitted,

J. VINCENT APRILE II
ASSISTANT DEPUTY PUBLIC ADVOCATE
OFFICE FOR PUBLIC ADVOCACY
STATE OFFICE BUILDING ANNEX
FRANKFORT, KENTUCKY 40601

Attorney for Petitioner

MARCH, 1980